Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

ERNEST HAVNER and MARILYN HAVNER, on Behalf of Their Minor Child, KELLY HAVNER,

and

ROBERT C. HILLIARD and BARRY J. NACE,

Petitioners,

vs.

MERRELL DOW PHARMACEUTICALS, INC.,

and

THE SUPREME COURT OF THE STATE OF TEXAS, consisting of CHIEF JUSTICE THOMAS PHILLIPS, and ASSOCIATE JUSTICES, GREG ABBOTT, JAMES BAKER, CRAIG ENOCH, RAUL GONZALEZ, DEBORAH HANKINSON, NATHAN HECHT, PRISCILLA OWENS, and ROSE SPECTOR,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The First, Fifth, and Fourteenth Amendments to the United States Constitution protect litigants and their counsel from state court retaliation in response to pleadings critical of that court's conduct. In the courtroom setting, the First Amendment stands for the proposition that judges cannot retaliate against attorneys who represent their clients zealously for that very zeal. The Constitution also protects litigants from those state courts that seek to apply established rules of law inconsistently in order to deny litigants their rights to due process and to punish litigants and their attorneys' for criticizing such courts. Petitioners ask this Court to enforce these constitutional protections.

Petitioners present three questions:

1. Does the United States Constitution protect Kelly Havner's right to file a brief containing language critical of the Texas Supreme Court[1] without suffering adverse consequences on the merits of her case because of that critical language?

2. Does the United States Constitution protect Kelly Havner's counsels' rights to criticize, within the limits of non-disruptive conduct, the Texas Supreme Court without fear

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[1] Since the events giving rise to this Petition, the Texas Supreme Court has changed in terms of its membership. Associate Justice Hankinson has replaced Associate Justice John Cornyn, whose name appears on both of the orders at issue here, Justice Hankinson took no part in the proceedings described herein.

QUESTIONS PRESENTED – Continued

of adverse consequences in the form of punitive and retaliatory measures against either said counsel or Kelly Havner?

3. Does the Constitution protect Kelly Havner's right to due process in the form of equal application of rules of law, regardless of her counsels' conduct?

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Kelly Havner, by and through her parents, Ernest and Marilyn Havner ("Kelly"), and Robert C. Hilliard and Barry J. Nace (counsel for Kelly in the proceedings below), respectfully petition the Supreme Court to issue a Writ of Certiorari to review certain decisions of the Texas Supreme Court, which decisions that court issued on November 13, and December 11, 1997.

OPINIONS BELOW

Kelly attaches the Texas Supreme Court's original opinion, opinion on rehearing, opinion on show cause order, and opinion on motion for leave to file motion for second rehearing, as Appendix Exhibits A, C, N, and S, respectively.[2]

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[2] Kelly provides the documents in the Appendix in chronological order of filing or issuance. In some instances, an exhibit to one document already is part of the Appendix; in other instances, some exhibits were irrelevant to this Petition and their inclusion would constitute unnecessary materials and a burden to this Court. Accordingly, and in the interests of economy, Kelly has not included with every document all exhibits originally attached thereto. Also, as to Appendix Item A ("App. A"), the original opinion of the Texas Supreme Court, after the preparation of the Appendix, counsel for Kelly learned that West has published the decision in the SouthWestern Reporter (Second). The opinion that counsel attached, however, is a copy of the court's document. The correct citation for the published decision is *Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706 (Tex. 1997). Counsel also has learned that the court released the show cause order at issue here to West for publication. The correct citation for that order is *Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706, 732 (Tex. 1997).

JURISDICTION

Kelly invokes this Court's certiorari jurisdiction pursuant to 28 U.S.C. §§ 1257, 2101 & 2104.[3]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Kelly references the following constitutional provisions: United States Constitution, Amendments I, V, and XIV. Kelly also references 28 U.S.C. § 1257(3)(a).

STATEMENT OF THE CASE

Kelly and her counsel ask this Court to resolve the dilemma in which they find themselves as a result of having criticized certain actions by the Texas Supreme Court. At issue is whether the United States Constitution protects Kelly from judicial retaliation in response to language used by her counsel in arguments made on her

[3] This case raises a peculiar jurisdictional question, namely, when is a judgment "final" within § 1257 when pre- and post-rehearing proceedings deny litigants federal constitutional protections. Because the procedural posture of this case renders the question of jurisdiction somewhat complicated, Kelly refers the Court to her Statement of the Case, below. This section focuses, among other things, on the events giving rise to the Court's jurisdiction and, in particular, the calculation of a date at which time the Texas Supreme Court issued a "final" decision for purposes of activating the petition for a writ of certiorari clock.

behalf. The Texas Supreme Court's response to the language it found offensive resulted in its refusing to treat Kelly as it does other, more favored, litigants on the issue of whether to order a remand or reversal.

The Constitution entitles Kelly to equal application of the law of Texas, regardless of the language her counsel chooses to employ. The Constitution also entitles her counsel to employ critical but non-disruptive language with confidence that a state court cannot penalize counsel – whether directly or indirectly through counsel's client – simply for the use of such language in a brief. The Constitution further protects an attorney's individual right to criticize – without judicial retaliation – a court for a perceived unfair result.

A. Proceedings Before the Texas Supreme Court.

1. Kelly Lost a Jury Verdict Under Circumstances That Both She and Her Counsel Perceived as Unfair.

Kelly, who contends she was born without a hand as a result of her mother's ingestion of Bendectin during pregnancy, won a state court, multi-million dollar verdict against Merrell Dow Pharmaceuticals, Inc. ("Merrell") nearly six years ago. (Vol. I, App. A at 4.) The nature of the litigation is effectively identical to that before this Court previously. *See, e.g., Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).[4] (Vol. I, App. A at 5-9.) Neither Merrell nor the Texas Supreme Court ever

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[4] Kelly provides parallel cites to the Supreme Court Reporter in her Table of Authorities.

have disputed that Kelly tried her case under Texas law as it existed at the time of trial. (*See, e.g.*, Vol. I, App. A at 3-4 and Vol. I, App. B at 78-88.)

On July 24, 1997, the Texas Supreme Court rewrote the law of Texas, applying a new standard of what constitutes expert scientific evidence to Kelly's case. (*Id.*) Rather than grant Kelly a new trial, however, the court rendered judgment against her, in naked disregard of the very rules of law in Texas which the court itself crafted. (*Id.*) The court did not overrule these laws, nor did it modify them; it simply ignored them. (*Id.*)

2. The Texas Supreme Court May Have Denied Kelly a Remand Because Her Attorneys Criticized the Court as Unfair.

Kelly's counsel thereafter filed a motion for rehearing (the "Motion for Rehearing") in which they castigated, on her behalf, the members of that court for the unfairness of the decision. (Vol. I, App. B.) In particular, counsel asked the court to remand, and not render, as the prevailing common law and procedural rules of practice in Texas, require. (*Id.* at 88-95.) Counsel further contended on Kelly's behalf that the court's decision violated both the Texas and United States Constitutions. (*Id.* at 75-76.) Merrell never contested Kelly's arguments to this effect.

Although the language Kelly's attorneys used in the Motion for Rehearing was, in fact, critical, it was in no way improper. (*See, e.g., id.*) No party – not even a single member of the Texas Supreme Court – ever has disputed that the Motion for Rehearing did not disrupt a single moment of court time. The Court itself acknowledged, in

fact, in a published statement by one of the Associate Justices, that Kelly's Motion for Rehearing neither disrupted court proceedings nor "bruised any feelings." "[T]he court's action had nothing to do with the judges' sensibilities. . . . " and "The motion was filed when most justices were on vacation or educational leave." (Vol. II, App. M, Ex. 3 at 288 [Justice Gonzalez speaking to *Texas Lawyer*, a newspaper].)[5]

On November 13, 1997, the court summarily overruled Kelly's motion for rehearing. (Vol. I, App. C at 113.) The court thus disregarded – without explanation – the critical issue Kelly raised in her motion for rehearing, namely, whether it denied Kelly justice – and therefore violated the Texas and United States Constitutions – when it chose to apply selectively, and in derogation of Kelly's rights here, the law of Texas requiring that when an appellate court overturns an existing standard of review, the losing party is entitled to a remand and not a reversal. (Vol. I, App. B at 88-92.)[6]

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[5] Associate Justice Gonzalez' comments may have violated Canon 3 of the Texas Code of Judicial Conduct, which bars a judge from commenting to the media on a pending matter. *See* Canon 3, § B.(10) ("A judge shall abstain from public comment about a pending or impending proceeding which may come before the judge's court in a manner which suggests to a reasonable person the judge's probable decision on any particular case.").

[6] Justice Spector – who later dissented from the court's decision to refer Messrs. Hilliard and Nace to the Grievance Committee of the State Bar of Texas (the "Grievance Committee") – herself concluded that the Motion for Rehearing was merely an "intemperate attack" on the court, which failed to address the legal issues pertinent to Kelly's case. (Vol. II,

The court addressed, instead, only the "tenor of the motion for rehearing," stating that the "tenor" required the court to consider whether Kelly's counsel were in contempt, and whether the court should sanction counsel, and/or refer counsel to the Grievance Committee. (Vol. I, App. C at 116.)

3. The Court Simultaneously Issued a Show Cause Order Based on Kelly's Counsels' Criticism of that Court.

When the court overruled the Motion for Rehearing, it declined to explain its decision to penalize her for her purported failure to satisfy a law not in effect at the time of her trial. The court chose, instead, to retaliate against Kelly and her counsel for the language contained by the Motion for Rehearing. Under the same cause number (in fact, in the same document denying Kelly's Motion for Rehearing), the Court ordered Kelly's counsel of record, namely Robert C. Hilliard, Barry J. Nace, and the undersigned counsel, Rebecca E. Hamilton, to show cause why the court should not punish them for the language in the Motion for Rehearing. (*Id.*)[7] In other words, the court left

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App. O.) Yet, all members of the court, including Justice Spector, ignored the weight of Kelly's Motion for Rehearing, which addressed specifically whether a court of appeals could selectively apply standards of review under the circumstances of the case. (Vol. I, App. B at 88-95.)

[7] Indeed, Kelly subsequently filed a motion to sever her case from that of her attorneys. The court overruled the motion to sever, declining either to assign the Show Cause Order proceedings to its administrative docket or to give them a separate cause number. (Vol. II, Apps. T and U.)

Kelly's proceedings open by issuing, in the same instrument as the denial of rehearing, a show cause order (the "Show Cause Order"), expressing in general terms why it viewed Kelly's counsels' conduct potentially contemptuous, sanctionable, and unethical.

4. The Texas Supreme Court Denied Kelly and Her Counsel Any Due Process in Connection With Its Show Cause Order.

The Texas Supreme Court was wholly unable to identify in the Show Cause Order *a single word* disruptive of the proceedings before it. The court instead identified only certain pages of the Motion for Rehearing, which contained, presumably, arguments whose "tenor" the court disdained. (Vol. I, App. C at 116.) In light of the lack of specificity of the Show Cause Order, Kelly and her counsel filed numerous motions seeking clarification, a hearing, a jury trial, and recusal – all of which motions the court ultimately denied.

a. The Texas Supreme Court Declined to Identify What Language in the Motion for Rehearing Disrupted Court Proceedings or Warranted Punishing Kelly and Her Attorneys.

Because the Court did not identify the language in the Motion for Rehearing about which it sought to find Kelly's counsel in contempt, Kelly's counsel needed

clarification from the court.[8] Counsels' only alternative was to guess about how they could have disrupted court administration by the mere filing of written words – for the parties never argued the Motion for Rehearing. Kelly's counsel thus moved the Court for clarification so that they could learn what items on the identified pages disrupted and/or were objectionable to the court. (Vol. I, App. D at 120-22, Vol. I, App. I at 160-61, and Vol. II, App. M at 252-56 [invoking the protections of the First, Fifth, and Fourteenth Amendments of the U.S. Constitution on behalf of both Kelly and her counsel].) The court overruled these motions. (*See* Vol. I, App. F and Vol. II, App. N.)[9]

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[8] *See, e.g.*, The Show Cause Order (Vol. I, App. C at 116.), which cites pages 8, 14, and 16 of the Motion for Rehearing (Vol. I, App. B at 79 & 89-91.) as examples of objectionable language. A cursory review of the Motion for Rehearing (Vol. I, App. B.) at these pages, however, reveals absolutely nothing disruptive to the judicial process. Indeed, pages 14 and 16 are primarily case citations. At most, those pages reflect the kind of rhetoric appellate practitioners employ every day, throughout all courts of this country.

[9] The court may have declined to clarify for the reasons discussed in Kelly's and her counsels' response to the Show Cause Order. (Vol. II, App. M at 220-49.) The Response demonstrated 113 separate examples of language by members of the Texas Supreme Court (contained in published opinions) accusing one and other in terms of an equal – and often far worse – "tenor." In particular, the Response itemized numerous excerpts from the court's published opinions in which members accused other members of bias and result orientation, of failure to follow case law, and of allowing cases to languish on appeal. The Response further itemized examples of negative metaphor employed by members of the court about each other (again, in published opinions) similar to that in the Motion for Rehearing.

b. The Texas Supreme Court Declined to Allow Any Discovery or Hearing.

Upon denial of the clarification motion(s), Kelly's counsel nevertheless prepared the Response to the Show Cause Order, attempting to anticipate the court's concerns. Kelly's counsel assumed that the court's offense arose from either language it found generically disrespectful or language suggesting bias. The First Amendment protects both forms of written language. *See, e.g., In re Little,* 404 U.S. 553, 555 (1972), and *Craig v. Harney,* 331 U.S. 367, 376 (1947). When at issue is language in a pleading that a court finds "disrespectful," the First Amendment affords counsel the opportunity to prove that the language did not disrupt judicial proceedings. When language critical of a court on the grounds of bias is the subject of contempt proceedings, the First Amendment entitles counsel the opportunity to prove truth. Accordingly, the First, Fifth, and Fourteenth Amendments afford due process in the form of, among other things, a right to a hearing.

Kelly's counsel thus asked for a hearing to prove that the language in the Motion for Rehearing, in fact, disrupted no part of court administration (as Justice Gonzalez already had told the media) and merely reflected constitutionally protected criticism of the court, albeit in strident (and often mixed) metaphor. Kelly's counsel also sought a hearing to prove the truth of any language as to bias. (Vol. I, App. E at 127-28, Vol. I, App. I at 159-61, and Vol. II, App. M at 258-59 [invoking the protections of the First, Fifth, and Fourteenth Amendments of the U.S. Constitution on behalf of both Kelly

and her counsel].)[10] Finally, Kelly's counsel asked for a jury trial on the issue of truth, as is their right under Texas and U.S. constitutional law. (Vol. I, App. H at 149-53 [invoking the protections of Texas law and U.S. Constitution].)[11] The court overruled these motions, too. (Vol. I, App. F and Vol. II, App. N.)

c. The Texas Supreme Court Declined to Recuse Itself.

In light of the factual issues raised as to disruption of proceedings and truth of bias allegations, Kelly's counsel asked for the Court to recuse itself in its entirety. (Vol. II, App. M at 261-62.) Recusal under the circumstances here is mandated by the Constitution. *See Muniz v. Hoffman*, 422 U.S. 454, 475-76 (1975), *Holt v. Virginia*, 381 U.S. 131, 136 (1965), and *Pointer v. Texas*, 380 U.S. 400, 405 (1965). The court overruled this motion, too. (Vol. II, App. N.)

d. The Texas Supreme Court Declined to Distinguish Punishing Kelly from Punishing Kelly's Counsel.

Separately from the motions, Kelly's counsel filed individual and joint responses to the Show Cause Order, pleading with the Court not to prejudice Kelly for her counsels' conduct and, further, that counsels' conduct was not contemptuous, sanctionable, nor grievable, in any event. (*See* Vol. II, App. M *passim*.) Kelly's counsel

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[10] *See, e.g., Holt v. Virginia*, 381 U.S. 131, 136 (1965) (quoting *In re Oliver*, 333 U.S. 257, 273 (1948)).

[11] *Ex parte Sproull*, 815 S.W.2d 250 (Tex. 1991).

contended that the Court was violating their First Amendment rights, as well as Kelly's. (*See generally* Vols. I & II, Apps. D-M.) Kelly's counsel specifically urged the court regarding Kelly, "To the extent that she has been punished for [her] counsels' conduct, [her] counsel urge the court to again rehear the legal issues and punish [her] counsel only." (Vol. II, App. M at 254.) The Court declined, however, either to address this issue or clarify the basis for its decision to reverse and render, rather than reverse and remand. (Vol. II, App. N.) Thus, again, the court intertwined Kelly's right to zealous representation with her right to due process on appeal.

B. This Court Has Jurisdiction.

State court proceedings about which a party seeks review by this Court must have culminated in a "final" order. 28 U.S.C. § 1257(3)(a). This requirement is jurisdictional. *Id.* At issue here, then, is when the Texas Supreme Court entered a final order as to all substantive matters pertaining to Kelly's case. *See, e.g., Pennsylvania v. Ritchie,* 480 U.S. 39, 47 (1987) ("Normally the finality doctrine contained in § 1257(3) is not satisfied if the state courts still must conduct further substantive proceedings before the rights of the parties as to the federal issues are resolved."), and *Flynt v. Ohio,* 451 U.S. 619, 620 (1981) (*per curiam*) ("In general, the final-judgment rule has been interpreted 'to preclude reviewability . . . where anything further remains to be determined by a State court, no matter how dissociated from the only federal issue that has finally been adjudicated by the highest court of the

State.' " (ellipsis in original) (quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945))).

1. The Court's Ruling Denying Rehearing on November 13, 1997 Was Not a "Final" Ruling.

The November 13th denial of rehearing did not resolve Kelly's case. Rather, the Texas Supreme Court's Show Cause Order carried forward Kelly's case and, more importantly, directly affected her right to zealous representation by the counsel of her choice. At issue substantively was whether the court denied Kelly's Motion for Rehearing because of the language her counsel had employed therein. Further, had the court determined to bar Mr. Nace from further practice in Texas, Kelly would have had lost one of her three counsel when she needed him most. Finally, by sanctioning all of her counsel, the court could have rendered Kelly effectively bereft of any representation in Texas at this critical juncture in her case. In short, the November 13th denial of rehearing left open substantive issues about Kelly's case on the merits and, therefore, was not a "final" ruling. *See Minnick v. California Dep't of Corrections*, 452 U.S. 105, 122-23 (1981) ("The answer to the question whether the further proceedings in the state trial court 'have little substance' or are 'wholly unrelated to the federal question' is affected not only by the specifics of the particular litigation but also by the extent to which the 'policy of strict necessity in disposing of constitutional issues.' " (quoting *Rescue Army v. Municipal Court*, 331 U.S. 549, 568 (1947))).

2. The Court's Ruling on December 11, 1997, Referring Messrs. Hilliard and Nace to the Grievance Committee, Was a "Final" Ruling.[12]

The court ultimately declined to enter any sanctions or findings of contempt as to any of the three counsel. It further declined to enter *any* findings against Ms. Hamilton, absolving her of any suggestion of misconduct. This decision was somewhat peculiar, given that Ms. Hamilton, the undersigned attorney here, admitted by affidavit to the Texas Supreme Court that she had drafted large parts of the Motion for Rehearing and consciously chosen to participate in its filing, knowing full well the nature – and probable effect – of the criticism it contained. (Vol. I, App. K.) Mr. Nace, on the other hand, attested by affidavit that he contributed *not one word* to the Motion for Rehearing and, in fact, never saw it prior to its filing. (Vol. I, App. G.) Mr. Hilliard and Ms. Hamilton supported Mr. Nace's statements in their affidavits. (Vol. I, Apps. I and K.) The Texas Supreme Court nevertheless chose to refer Mr. Nace – and not Ms. Hamilton – to the Grievance Committee.[13]

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[12] Civil contempt proceedings "colored by First Amendment overtones," are appealable for purposes of Supreme Court review. *In re Roche*, 448 U.S. 1310, 1316 n.3 (citing *New York Times Co. v. Jascalevich*, 439 U.S. 1317, 1318-19 (1978)).

[13] Interestingly, and during its campaign season, the largely Republican court referred two democrats, Messrs. Hilliard and Nace, and absolved Ms. Hamilton, the lone Republican, the undersigned attorney. Mr. Nace has contended strenuously that Ms. Hamilton's affidavit swayed the court because, in it, she attested to being a Republican and a supporter of the court. (Vol. II, App. P at 296-301.) While the undersigned attorney is appreciative of the court's decision *not* to send her to the

The court referred Messrs. Hilliard and Nace to the Grievance Committee by written order, dated December 11, 1997. December 11, 1997, thus, is the earliest date the petition for certiorari clock could have started.[14] *See Cox v. Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) ("The Court has noted that 'considerations of English usage as well as those of judicial policy' would justify an interpretation of the final-judgment rule to preclude review 'where anything further remains to be determined by a State court, no matter how disassociated from the only federal issue that has finally been adjudicated by the highest court of the State.' ") (quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. at 124)).

REASONS FOR GRANTING THE WRIT

The Texas Supreme Court has violated Kelly's constitutional rights twice and her counsels' once. As to Kelly, the court violated her due process and equal protection rights by declining to apply its rules of remand to her case as it has to other cases. *See, e.g., Evitts v. Lucey*, 469 U.S. 387, 400-01 (1985) ("The right to appeal would be

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Grievance Committee, if Mr. Nace's contentions are true, she is ashamed to have received the court's favor in this manner.

[14] One Supreme Court Justice, Justice Rose Spector, dissented on the referral order, intimating that the court had declined to address the merits of the Motion for Rehearing because of the criticism of the court contained therein. Accordingly, Kelly filed a second motion for rehearing. (Vol. II, App. R.) The court denied the second motion for rehearing on January 16, 1998. (Vol. II, App. S.) Again, Justice Spector dissented. (*Id.*)

unique among state actions if it could be withdrawn without consideration of applicable due process norms."). The court further violated Kelly's First Amendment and due process rights by punishing her for the language the Motion for Rehearing contained. *See, e.g., Craig v. Harney,* 331 U.S. 367, 376 (1947). As to Kelly's counsel, the court violated their First Amendment and due process rights by publicly shaming them and referring them to the Grievance Committee (by a published order appended to its decision on the merits, *see Merrell Dow Pharmaceuticals, Inc. v. Havner,* 953 S.W.2d 706 (Tex. 1997)). The court did so in response to admittedly non-disruptive language, contained in a brief filed with the court, and in the absence of any due process procedures, such as proper notice and a hearing.

A. The First, Fifth, and Fourteenth Amendments to the United States Constitution Protect a Litigant from Unequal Application of Existing Law and from Judicial Retaliation in Response to Legal Arguments Made By That Litigant's Counsel.

This Court long has held that the discriminatory application of laws against particular individuals is a violation of due process.[15] *See Papachristou v. City of Jacksonville,* 405 U.S. 156, 162 (1972), and *Thornhill v. Alabama,*

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[15] While it is true that there is no constitutional right to an appeal in and of itself, "if a State has created appellate courts as 'an integral part of the . . . system. . . . the procedures used must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution." *See Evitts v. Lucey,* 469 U.S. at 393 (quoting *Griffin v. Wainwright,* 372 U.S. 335, 344 (1963)).

310 U.S. 88, 95-96 & nn. (1940) (holding that selective prosecution by way of laws that affect an individual's right to free speech constitutes a denial of substantive due process). In *Papachristou,* this Court observed, "Living under a rule of law entails various suppositions, one of which is that 'all persons are entitled to be informed as to what the State commands or forbids.' " 405 U.S. at 162 (quoting *Lanzetta v. New Jersey,* 306 U.S. 451, 453 (1939)). Further, this Court specifically has held that, "the due process implications are equally applicable to the States." *Papachristou,* 405 U.S. at 165. "In short, when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution – and, in particular, in accord with the Due Process Clause." *Evitts,* 469 U.S. at 401.

No party has denied – nor could they, as this record makes clear – that Kelly originally tried her case under the laws of Texas as they stood at the time of trial.[16] And she won.

What Kelly disputes is whether a court has the right to (i) change the law under which a litigant properly tried her case (and met all relevant burdens), (ii) reverse the original jury decision in that litigant's favor, and then (iii) deny the litigant a new trial. "Where, as here, there are no standards governing the exercise of discretion . . . , the

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[16] Kelly does not dispute here and has never disputed that a state supreme court has the power to "pull the rug out from under" a litigant and change the law (the value of *stare decisis* being particularly ephemeral in a state with an elected judiciary).

scheme permits and encourages an arbitrary and discriminatory enforcement of the law. It furnishes a convenient tool for 'harsh and discriminatory enforcement by local . . . officials, against particular groups deemed to merit their displeasure.' " *Papachristou*, 405 U.S. at 170 (quoting *Thornhill*, 310 U.S. 97-98)).

Kelly contested the constitutionality of the court's actions in her Motion for Rehearing and her Response to the Court's Show Cause Order.[17] The Texas Supreme Court declined at every juncture to respond to these issues. Only this Court can order it to do so.

Kelly petitions this Court to reverse the Texas Supreme Court's decision on rehearing, and order it to delineate its treatment of Kelly from its treatment of her attorneys. As it stands, Kelly and her counsel have no way of knowing whether the court retaliated against Kelly for her counsels' conduct. This Court is the only authority to which she now can turn. While Kelly protests

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[17] Kelly adequately has preserved error on the issues raised here. Kelly raised the constitutionality of the Texas Supreme Court's actions in her Motion for Rehearing and the Response to Show Cause Order (and pleadings related thereto). (*See also* Vol. II, App. R at 319-20.) Consequently, prior to the court entering a final order in her case, Kelly fully had raised the issue of the constitutionality of the court's failure to grant her a remand, the court's punishment of her for her counsels' choice of briefing language; further, her counsel had preserved their First Amendment complaints, as well. *See Payton v. New York*, 445 U.S. 573, 583 n.19 (1980), and *Raley v. Ohio*, 360 U.S. 423, 436-37 & n.12 (1959); *see also Vachon v. New Hampshire*, 414 U.S. 478, 479 n.3 (1974) (per curiam), and *Blonder-Tongue Labs., Inc. v. University of Ill. Found.*, 402 U.S. 313, 319-20 & n.6 (1971).

here that the Texas Supreme Court acted unconstitutionally when it declined to apply to her the laws of Texas as it has to other litigants, Kelly asks only at this time that this Court abstain at this time (subject to further review at a later date, if necessary) from the underlying question of the propriety of the Texas Supreme Court's decision not to reverse and remand. Kelly makes this request in deference to the Texas Supreme Court, in order that the Texas Supreme Court has an opportunity to explain the legal basis for its decisions in this matter. The alternative is for this Court to order a new trial for Kelly, without giving the Texas Supreme Court an opportunity to explain its conduct. Obviously, the latter course is preferable.

B. The First, Fifth, and Fourteenth Amendments to the United States Constitution Protect a Litigant's Counsel's Right to Make Non-Disruptive Legal Arguments in Filed Papers.

The significance of the First Amendment can be no greater than in the arena of criticism of the judiciary. This Court recognizes that freedom of expression has particular significance with respect to the government because "it is here that the state has a special incentive to repress opposition and often wields a more effective power of suppression." *First Nat'l Bank v. Bellotti,* 435 U.S. 765, 777 n.11 (1978) (quoting T. Emerson, *Toward a General Theory of the First Amendment* 9 (1966)). In *Bellotti,* speaking further about legislative power, the Court observed:

> Such power in government to channel the expression of views is unacceptable under the First Amendment. Especially where, as here, the

> legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended.

Id. at 785-86 (footnotes omitted).

The Court spoke in *Bellotti* of (1) legislative power in the context of (2) prior restraints. The situation at issue here is even graver. As to the legislative power distinction, at least a legislature answers to the judicial system on constitutional issues. To whom, if not this Court, does a state supreme court answer when an aggrieved litigant believes that court to have violated the United States Constitution? If a state court is not to answer to this Court under the circumstances here, then a state supreme court has unlimited power to suppress all criticism of itself under the guise of disapproving of the "tenor" of arguments in briefs. The founding fathers would roll over in their graves if they knew that this is how the First Amendment stands today.

As to the prior restraint distinction, at least a prior restraint can be litigated: persons potentially subject to its reach presumably know the law exists. When a state supreme court punishes an attorney for criticizing it in a brief, in the absence of any law or notice (which law or notice, hopefully, would violate the First Amendment, anyway), both the client and the attorney are struck at the knees and deprived of virtually any weapon of defense. Such a result is particularly absurd here, given the Texas Supreme Court's well-documented history of verbal self-flagellation in terms more inflammatory than those used by Kelly's counsel in the Motion for Rehearing. (*See* Vol.

II, App. M at 220-49.) In short, "the concept that government may restrict the speech of some elements of our society [*e.g.*, litigants and their counsel] to enhance the relative voice of others [*e.g.*, a state supreme court] is wholly foreign to the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976).

The Constitution requires *for these precise reasons* that, prior to penalizing counsel for language counsel employs in court, the language at issue must be "disruptive" of the "administration of justice." *In re Little*, 404 U.S. 553, 555 (1972), and *Craig v. Harney*, 331 U.S. at 376. Criticism, in and of itself, is not disruptive. The vehemence of the language used is not alone the measure of the power to punish for contempt; rather, it is, "the fires which it kindles," which "must constitute an imminent, not merely a likely, threat to the administration of justice." *Craig v. Harney*, 331 U.S. at 376. The requirement of a showing of "disruption" is even more necessary when the language at issue is in a written pleading, as opposed to being an oral statement in open court. *See id.* ("If the point had been made in a petition for rehearing and reduced to lawyer's language, it would be of trifling consequence.").

The record before this Court – *the very same record upon which the Texas Supreme Court predicated its Show Cause Order and referral to the Grievance Committee* – contains absolutely no evidence that Kelly's counsels' conduct was disruptive of or obstructive to the administration of justice. The only evidence is, in fact, to the contrary. As noted above, the Court itself acknowledged, in a published statement by one of the Associate Justices, that Kelly's Motion for Rehearing neither disrupted court proceedings nor

"bruised any feelings." "[T]he court's action had nothing to do with the judges' sensibilities. . . . " and "The motion was filed when most justices were on vacation or educational leave." (Vol. II, App. M, Ex. 3 at 288 [Justice Gonzalez speaking to *Texas Lawyer,* a newspaper].)

Under these circumstances, no court constitutionally could hold that improper conduct occurred. As this Court observed in *In re McConnell,* 370 U.S. 230 (1962):

> An obstruction to the performance of judicial duty resulting from an act done in the presence of the court is, then, the characteristic upon which the power to punish for contempt must rest. This being true, it follows that the presence of that element must clearly be shown in every case where the power to punish for contempt is exerted.

Id. at 234 (quoting *Ex parte Hudgings,* 249 U.S. 378, 383 (1919)); *see also, Holt v. Virginia,* 381 U.S. 131, 136 (1965) (addressing "vile, contemptuous, insulting" language used in allegations of bias and need to recuse, and observing, "Their convictions rest on nothing whatever except allegations made in motions for change of venue and disqualification of Judge Holladay because of alleged bias on his part."). After all, "The law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude, able to thrive in a hardy climate." *Craig v. Harney,* 331 U.S. at 376.

The Texas Supreme Court's decision to refer Messrs. Hilliard and Nace drove a wedge between Kelly and her attorneys because, and by way as example only, she no longer knew whether: (1) the Court had denied the

Motion for Rehearing on the merits or as punishment for her counsels' conduct; (2) Mr. Nace could represent her in Texas; (3) her counsel had acted on her behalf and in her interests when they filed the Motion for Rehearing; and (4) she needed different counsel to file a new motion for rehearing on her behalf.

The court's decision also caused harm to Kelly's counsel because it caused her counsel to suffer shame and injury to their reputation. *See Walker v. City of Mesquite*, 129 F.3d 831 (5th Cir. 1997) (the Court is "persuaded beyond peradventure that one's professional reputation is a lawyer's most important and valuable asset"). Regardless of any subsequent conduct by the Grievance Committee (in other words, regardless of the outcome of any grievance proceedings), the court's show cause order and referral to the Grievance Committee, in and of itself, permanently has harmed Messrs. Hilliard's and Nace's reputations.

CONCLUSION

Kelly and her counsel petition the Court for the following relief. *First*, Kelly asks the Court to reverse the Texas Supreme Court's decisions, and either (1) order it to delineate its treatment of Kelly from its treatment of her attorneys, explaining why it denied her a remand (and instead reversed and rendered) or (2) address the merits of the due process arguments she raises in connection with the 'remand v. reversal' issue.

Second, Kelly's counsel ask the court to reverse and rescind the Texas Supreme Court's order of referral to the

Grievance Committee. As to the First Amendment issues, the Texas Supreme Court has denied counsel all due process. The court's actions have harmed counsels' reputations (and attorney-client relationship with Kelly) beyond doubt. If this Court fails to enforce the Constitution's protections on these matters, counsel's reputation will remain stained.

Respectfully submitted,

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March 11, 1998

(2)

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OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1997

ERNEST HAVNER and MARILYN HAVNER, on Behalf of Their Minor Child, KELLY HAVNER,

and

ROBERT C. HILLIARD and BARRY J. NACE,

vs. *Petitioners,*

MERRELL DOW PHARMACEUTICALS, INC.,

and

THE SUPREME COURT OF THE STATE OF TEXAS, consisting of CHIEF JUSTICE THOMAS PHILLIPS, and ASSOCIATE JUSTICES, GREG ABBOTT, JAMES BAKER, CRAIG ENOCH, RAUL GONZALEZ, DEBORAH HANKINSON, NATHAN HECHT, PRISCILLA OWENS, and ROSE SPECTOR,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court of Texas

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APPENDIX A

IN THE SUPREME COURT OF TEXAS

No. 95-1036

MERRELL DOW PHARMACEUTICALS, INC., PETITIONER

v.

ERNEST HAVNER AND MARILYN HAVNER ON BEHALF OF THEIR MINOR CHILD KELLY HAVNER, RESPONDENTS

ON APPLICATION FOR WRIT OF ERROR TO THE COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS

Argued on March 19, 1996

JUSTICE OWEN delivered the opinion of the Court in which CHIEF JUSTICE PHILLIPS, JUSTICE GONZALEZ, JUSTICE HECHT, JUSTICE CORNYN, JUSTICE ENOCH, and JUSTICE ABBOTT join.

JUSTICE GONZALEZ filed a concurring opinion.

JUSTICE SPECTOR filed a concurring opinion.

JUSTICE BAKER not sitting.

The issue in this case is whether there is any evidence that the drug Bendectin caused Kelly Havner to be born with a birth defect. We hold that the evidence offered is legally insufficient to establish causation. Accordingly, we reverse the judgment of the court of appeals. 907 S.W.2d 535.

I

Kelly Havner was born with a limb reduction birth defect. The fingers on her right hand were not formed. Kelly's mother had taken the prescription drug Bendectin in 1981 during her pregnancy to relieve nausea and other symptoms associated with morning sickness. Bendectin was formulated by Merrell Dow and its predecessors and marketed in the United States from 1957 to 1983. It was sold in other countries as well, but was called Debendox in the British Commonwealth, Ireland, and Australia and Lenotan in West Germany. The Bendectin Marilyn Havner ingested had two components: doxylamine succinate, which is an antihistamine, and pyridoxine hydrochloride, which is vitamin B-6. Prior to 1977, Bendectin had contained a third component, dicylomine hydrochloride, which is an anticholergenic. Approximately thirty million women took Bendectin in either the two- or three-ingredient form.

More than twenty years ago, questions were raised about Bendectin and its possible association with birth defects. The FDA investigated the concerns, but failed to conclude that Bendectin increased the risk of birth defects. More than thirty studies on Bendectin and birth defects have been conducted and published in peer-reviewed scientific and medical journals since questions were first raised. None of these studies concludes that children of women who took Bendectin during pregnancy had an increased risk of limb reduction birth defects. Some of these studies affirmatively conclude that there is no association between Bendectin and birth defects and that Bendectin is a safe drug. Although FDA approval of

Bendectin has never been revoked, Merrell Dow withdrew the drug from the market in 1983, a little over a year after Kelly Havner was born.

The Havners' suit is based on theories of negligence, defective design, and defective marketing. It is one of thousands brought against Merrell Dow and its predecessors for the manufacture and distribution of Bendectin. In virtually all the Bendectin litigation, the central issue has been the scientific reliability of the expert testimony offered to establish causation. Merrell Dow challenged the Havners' causation evidence at several junctures in these proceedings. It filed a motion for summary judgment, contending that there is no scientifically reliable evidence that Bendectin causes limb reduction birth defects or that it caused Kelly Havner's birth defect. Before denying the motion, the trial court held a hearing at which the scientific reliability of the Havners' summary judgment evidence was extensively aired.

Just before trial, the scientific reliability of the Havners' evidence was again raised by Merrell Dow in motions in limine that sought to exclude the testimony of certain of the Havners' experts and other causation evidence. Once of these motions requested that testimony about causation be excluded until a prima facie case had been established that there was a statistically significant elevated risk that a child would be born with limb reduction birth defects if the child's mother ingested Bendectin. Another motion sought to preclude the Havners' witnesses from relying on *in vitro* and *in vivo* animal studies. Other motions sought to exclude entirely the testimony of three of the Havners' causation witnesses.

The issues were fully briefed, and after a lengthy hearing, the trial court denied each of the motions.

A bifurcated jury trial ensued. In the liability phase, the Havners called five experts on the causation question. Merrell Dow objected to the admission of some, but not all, of this evidence. Merrell Dow also unsuccessfully moved for a directed verdict on the issues of causation at the close of the Havners' evidence. As can be seen from the record the question of scientific liability was raised repeatedly.

At the conclusion of the liability phase, the jury found in favor of the Havners and awarded $3.75 million. In the punitive damages stage, the jury awarded $30 million, but that amount was reduced by the trial court to $15 million pursuant to former TEX. CIV. PRAC. & REM. CODE § 41.007. Merrell Dow appealed.

The panel of the court of appeals that originally heard the case reversed and rendered judgment that the Havners take nothing, holding that the evidence of causation was legally insufficient. 907 S.W.2d at 548. The panel concluded that "[t]he Havners have failed to bring forward anything more than suspicion on the essential element of causation." *Id.* On rehearing en banc, a divided court disagreed. It affirmed the trial court's award of actual damages, but reversed and rendered the award of punitive damages. *Id.* at 564. We granted Merrell Dow's application for writ of error.

Merrell Dow challenges the legal sufficiency of the Havners' causation evidence and the admissibility of some of that evidence and further contends that its due process rights under the United States Constitution and its due course rights under the Texas Constitution were

denied. Because of our disposition of this case, we reach only the no evidence point of error.

II

All the expert witnesses on causation have appeared in other cases in which Bendectin was claimed to have caused limb reduction birth defects. The Sixth Circuit commented that the Bendectin suits are "variations on a theme, somewhat like an orchestra which travels to different music halls, substituting musicians from time to time but playing essentially the same repertoire." *Turpin v. Merrell Dow Pharms., Inc.*, 959 F.2d 1349, 1351 (6th Cir. 1992).

The federal courts have dealt extensively with Bendectin litigation. To date, no plaintiff has ultimately prevailed in federal court. The evidence in those cases has been similar to that offered by the Havners. The federal decisions have discussed the substance of the evidence in detail, and often the testimony under scrutiny included that of Drs. Palmer, Newman, Glasser, Gross, and Swan, the Havners' witnesses. These decisions are not binding on our Court, but they do provide extensive consideration of the scientific reliability of the causation evidence.

Some federal courts have concluded that the expert evidence of causation is legally insufficient. *See Elkins v. Richardson-Merrell, Inc.*, 8 F.3d 1068 (6th Cir. 1993); *Turpin*, 959 F.2d 1349; *Brock v. Merrell Dow Pharms., Inc.*, 874 F.2d 307 (5th Cir.), *modified on reh'g*, 884 F.2d 166 (5th Cir. 1989); *Richardson v. Richardson-Merrell, Inc.*, 857 F.2d 823 (D.C. Cir. 1988); *LeBlanc v. Merrell Dow Pharms., Inc.*, 932 F. Supp. 782 (E.D. La. 1996); *Hull v. Merrell Dow Pharms.*,

Inc., 700 F. Supp. 28 (S.D. Fla. 1988); *Monahan v. Merrell-National Labs.*, No. 83-3108-WD, 1987 WL 90269 (D. Mass. Dec. 18, 1987).

Other federal courts have found the expert evidence to be inadmissible. *See Raynor v. Merrell Pharms., Inc.*, 104 F.3d 1371 (D.C. Cir. 1997); *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311 (9th Cir.) (on remand), *cert. denied*, 116 S. Ct. 189 (1995); *Ealy v. Richardson-Merrell, Inc.*, 897 F.2d 1159 (D.C. Cir. 1990); *Lynch v. Merrell-National Labs.*, 830 F.2d 1190 (1st Cir. 1987); *DeLuca v. Merrell Dow Pharms., Inc.*, 791 F. Supp. 1042 (D.N.J. 1992), *aff'd*, 6 F.3d 778 (3d Cir. 1993); *Lee v. Richardson-Merrell, Inc.*, 772 F. Supp. 1027 (W.D. Tenn. 1991), *aff'd*, 961 F.2d 1577 (6th Cir. 1992); *Cadarian v. Merrell Dow Pharms., Inc.*, 745 F. Supp. 409 (E.D. Mich. 1989); *Ambrosini v. Richardson-Merrell, Inc.*, No. 86-278, 1989 WL 298429 (D.D.C. June 30, 1989), *aff'd*, 946 F.2d 1563 (D.C. Cir. 1991); *Will v. Richardson-Merrell, Inc.*, 647 F. Supp. 544 (S.D. Ga. 1986).

One federal circuit court initially found the expert testimony admissible and reversed a summary judgment for Merrell Dow. *DeLuca v. Merrell Dow Pharms., Inc.*, 911 F.2d 941, 952-59 (3d Cir. 1990). However, on remand the trial court once again found the evidence inadmissible and, after entering extensive findings of fact and conclusions of law, granted summary judgment for Merrell Dow. The Third Circuit affirmed that judgment with an unpublished opinion. *DeLuca v. Merrell Dow Pharms., Inc.*, 791 F. Supp. 1042 (D.N.J. 1992), *aff'd*, 6 F.3d 778 (3d Cir. 1993).

A few federal district courts have denied summary judgment for Merrell Dow on the basis that the evidence

raised a fact question. *Longmore v. Merrell Dow Pharms., Inc.*, 737 F. Supp. 1117 (D. Idaho 1990); *In re Bendectin Prods. Liab. Litig.*, 732 F. Supp. 744 (E.D. Mich. 1990); *Hagen v. Richardson-Merrell, Inc.*, 697 F. Supp. 334 (N.D. Ill. 1988); *see also Lanzilotti v. Merrell Dow Pharms., Inc.*, No. 82-0183, 1986 WL 7832 (E.D. Pa. July 10, 1986) (denying motion for directed verdict).

Decisions in which Merrell Dow obtained a jury verdict in its favor include *Wilson v. Merrell Dow Pharmaceuticals, Inc.*, 893 F.2d 1149 (10th Cir. 1990), and *In re Bendectin Litigation*, 857 F.2d 290 (6th Cir. 1988).

However, a state trial court recently entered judgment on a jury verdict against Merrell Dow that included a finding of fraud. In a written opinion, the court was highly critical of the evidence offered by Merrell Dow, concluding that there was ample evidence Merrell Dow had made misrepresentations to the FDA, including misrepresentations about its animal studies on Bendectin. *Blum v. Merrell Dow Pharm., Inc.*, No. 1027 (Pa. Ct. C.P. Dec. 13, 1996) (appeal pending).

At least one state court has granted summary disposition for Merrell Dow on the basis that the expert testimony of Drs. Newman, Palmer, and Swan was inadmissible. *Depyper v. Navarro*, No. 83-303467-NM, 1995 WL 788828 (Mich. Cir. Ct. Nov. 27, 1995) (holding plaintiffs' experts' testimony inadmissible under the *Davis/Frye* rule and rendering judgment for Merrell Dow).

The only appellate decision we have found, state or federal, that has upheld a verdict in favor of a plaintiff in a Bendectin case is from the court of appeals for the

District of Columbia in *Oxendine v. Merrell Dow Pharmaceuticals, Inc.*, 506 A.2d 1100 (D.C. 1986) (reversing judgment notwithstanding the verdict and remanding for reinstatement of compensatory damages and determination of punitive damages). However, the subsequent history of that case is somewhat extraordinary. Upon remand to the trial court, instead of following the court of appeals' directive, the trial court granted Merrell Dow's motion for new trial and vacated the judgment. Another appeal ensued, and the case was remanded with instructions that a judgment be entered on the verdict. *Oxendine v. Merrell Dow Pharmaceuticals, Inc.*, 563 A.2d 330, 331, 338 (D.C. 1989). Judgment was entered. Yet another appeal was taken, but the appeal was dismissed for lack of finality because the question of punitive damages remained to be tried. *Merrell Dow Pharms., Inc. v. Oxendine*, 593 A.2d 1023 (D.C. 1991). Following remand, judgment was entered, but Merrell Dow sought relief from the judgment in light of post-trial developments including epidemiological studies that were not completed at the time of trial. Merrell Dow also relied on appellate decisions decided on the heels of the first appellate decision in *Oxendine* that had concluded that there was no scientifically reliable evidence of causation in the Bendectin cases. The trial court declined to set aside the judgment. *Merrell Dow Pharms., Inc. v. Oxendine*, 649 A.2d 825, 827 (D.C. 1994). The fourth appeal ensued, and the appellate court remanded the case to the trial court for a determination of whether Merrell Dow could demonstrate "that the newly discovered evidence 'would probably produce a different verdict if a new trial were

granted.' " *Id.* at 832. On remand, the trial court extensively reviewed the evidence, including the testimony or affidavits of Drs. Newman, Swan, Palmer, Gross, and Glasser, and granted relief from the verdict, rendering judgment for Merrell Dow. *Oxendine v. Merrell Dow Pharms., Inc.*, No. 82-1245, 1996 WL 680992 (D.C. Super. Ct. Oct. 24, 1996) (appeal pending).

Thus, we are not the first court to wrestle with the issues presented by the Bendectin litigation.

III

As in most of the Bendectin cases, the central issue before us is not whether the plaintiffs' witnesses possessed adequate credentials, skills, or experience to testify about causation. The only witness whose qualifications have been challenged is Dr. Palmer, whose experience in identifying the cause of birth defects is questioned by Merrell Dow. *Cf. United Blood Servs. v. Longoria*, 938 S.W.2d 29, 30-31 (Tex. 1997); *Broders v. Heise*, 924 S.W.2d 148, 151-54 (Tex. 1996). Indeed, the Havners' causation witnesses, including Dr. Palmer, testified in a case that reached the United States Supreme Court, and that Court deemed their credentials "impressive." *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 583 & n.2 (1993). The issue before us, as in most of the previously cited Bendectin cases, is whether the Havners' evidence is scientifically reliable and thus some evidence to support the judgment in their favor.

In determining whether there is no evidence of probative force to support a jury's finding, all the record evidence must be considered in the light most favorable

to the party in whose favor the verdict has been rendered, and every reasonable inference deducible from the evidence is to be indulged in that party's favor. *Harbin v. Seale*, 461 S.W.2d 591, 592 (Tex. 1970). A no evidence point will be sustained when (a) there is a complete absence of evidence of a vital fact, (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (c) the evidence offered to prove a vital fact is no more than a mere scintilla, or (d) the evidence conclusively establishes the opposite of the vital fact. Robert W. Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 TEX. L. REV. 361, 362-63 (1960). More than a scintilla of evidence exists when the evidence supporting the finding, as a whole, " 'rises to a level that would enable reasonable and fair-minded people to differ in their conclusions.' " *Burroughs Wellcome Co. v. Crye*, 907 S.W.2d 497, 499 (Tex. 1995) (quoting *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 25 (Tex. 1994)).

Several of the Havners' experts testified that Bendectin can cause limb reduction birth defects. Dr. Palmer testified that, to a reasonable degree of medical certainty, Kelly Havner's birth defect was caused by the Bendectin her mother ingested during pregnancy. We have held, however, that an expert's bare opinion will not suffice. *See Burroughs Wellcome*, 907 S.W.2d at 499-500; *Schaefer v. Texas Employers' Ins. Ass'n*, 612 S.W.2d 199, 202-04 (Tex. 1980). The substance of the testimony must be considered. *Burroughs Wellcome*, 907 S.W.2d at 499-500; *Schaefer*, 612 S.W.2d at 202.

In *Schaefer*, a workers' compensation case, the plaintiff suffered from atypical tuberculosis, some strains of

which were carried by fowl. An expert testified that based on reasonable medical probability, the plaintiff's disease resulted from his employment as a plumber in which he was exposed to soil contaminated with the feces of birds. *Schaefer,* 612 S.W.2d at 202. Nevertheless, this Court looked at the testimony in its entirety, noting that to accept the expert's opinion as some evidence "simply because he used the magic words" would effectively remove the jurisdiction of the appellate courts to determine the legal sufficiency of the evidence in any case requiring expert testimony. *Id.* at 202-05. After considering the record in *Schaefer,* this Court held that there was no evidence of causation because despite the "magic language" used, the expert testimony was not based on reasonable medical probability but instead relied on possibility, speculation, and surmise. *Id.* at 204-05.

Other courts have likewise recognized that it is not so simply because "an expert says it is so." *Viterbo v. Dow Chem. Co.,* 826 F.2d 420, 421 (5th Cir. 1987). When the expert "br[ings] to court little more than his credentials and a subjective opinion," this is not evidence that would support a judgment. *Id.* at 421-22. The Fifth Circuit in *Viterbo* affirmed a summary judgment and the exclusion of expert testimony that was unreliable, holding that "[i]f an opinion is fundamentally unsupported, then it offers no expert assistance to the jury." *Id.* at 422; *see also Rosen v. Ciba-Geigy Corp.,* 78 F.3d 316, 319 (7th Cir.) ("[A]n expert who supplies nothing but a bottom line supplies nothing of value to the judicial process."), *cert. denied,* 117 S. Ct. 73 (1996); *Turpin v. Merrell Dow Pharms., Inc.,* 959 F.2d 1349, 1360 (6th Cir. 1992) (holding evidence legally

insufficient in Bendectin case when no understandable scientific basis was stated).

It could be argued that looking beyond the testimony to determine the reliability of scientific evidence is incompatible with our no evidence standard of review. If a reviewing court is to consider the evidence in the light most favorable to the verdict, the argument runs, a court should not look beyond the expert's testimony to determine if it is reliable. But such an argument is too simplistic. It reduces the no evidence standard of review to a meaningless exercise of looking to see only what words appear in the transcript of the testimony, not whether there is in fact some evidence. We have rejected such an approach. *See Schaefer,* 612 S.W.2d at 205; *see also Burroughs Wellcome,* 907 S.W.2d at 499-500.

Justice Gonzalez, in writing for the Court, gave rather colorful examples of unreliable scientific evidence in *E.I. du Pont de Nemours & Co. v. Robinson,* 923 S.W.2d 549, 558 (Tex. 1995), when he said that even an expert with a degree should not be able to testify that the world is flat, that the moon is made of green cheese, or that the Earth is the center of the solar system. If for some reason such testimony were admitted in a trial without objection, would a reviewing court be obliged to accept it as some evidence? The answer is no. In concluding that this testimony is scientifically unreliable and therefore no evidence, however, a court necessarily looks beyond what the expert said. Reliability is determined by looking at numerous factors including those set forth in *Robinson* and *Daubert.* The testimony of an expert is generally *opinion* testimony. Whether it rises to the level of *evidence* is determined under our rules of evidence, including Rule

702, which requires courts to determine if the opinion testimony will assist the jury in deciding a fact issue.[1] While Rule 702 deals with the admissibility of evidence, it offers substantive guidelines in determining if the expert testimony is some evidence of probative value.

Similarly, to say that the expert's testimony is some evidence under our standard of review simply because the expert testified that the underlying technique or methodology supporting his or her opinion is generally accepted by the scientific community is putting the cart before the horse. As we said in *Robinson*, an expert's bald assurance of validity is not enough. 923 S.W.2d at 559 (quoting *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1316 (9th Cir.) (on remand) (holding that expert's assertion of validity is not enough; there must be objective, independent validation of the expert's methodology), *cert. denied*, 116 S. Ct. 189 (1995)).

The view that courts should not look beyond an averment by the expert that the data underlying his or her opinion are the type of data on which experts reasonably rely has likewise been rejected by other courts. The underlying data should be independently evaluated in determining if the opinion itself is reliable. *See, e.g., In re*

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[1] Rule 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify in the form of an opinion or otherwise.

TEX. R. CIV. EVID. 702.

Paoli R.R. Yard PCB Litig., 35 F.3d 717, 747-48 (3d Cir. 1994); *Richardson v. Richardson-Merrell, Inc.*, 857 F.2d 823, 829 (D.C. Cir. 1988); *In re Agent Orange Liab. Litig.*, 611 F. Supp. 1223, 1245 (E.D.N.Y. 1985), *aff'd*, 818 F.2d 187 (2d Cir. 1987). In the wake of the Supreme Court's decision in *Daubert*, the Third Circuit overruled its prior holding in *DeLuca v. Merrell Dow Pharmaceuticals, Inc.*, 911 F.2d 941, 952 (3d Cir. 1990), that an expert's averment that his or her testimony is based on the type of data on which experts reasonably rely is generally enough to survive a Federal Rule of Evidence 703 inquiry. *In re Paoli*, 35 F.3d at 747-48. The Third Circuit was persuaded by Judge Weinstein's opinion in *In re Agent Orange:* " 'If the underlying data are so lacking in probative force and reliability that no reasonable expert could base an opinion on them, an opinion which rests entirely upon them must be excluded.' " *Id.* at 748 (quoting *In re Agent Orange*, 611 F. Supp. at 1245). If the expert's scientific testimony is not reliable, it is not evidence. The threshold determination of reliability does not run afoul of our no evidence standard of review.

Indeed, the United States Supreme Court would agree that a determination of scientific reliability is appropriate in reviewing the legal sufficiency of evidence. While admissibility rather than sufficiency was the focus of the Supreme Court's decision in *Daubert*, that Court explained that when "wholesale exclusion" is inappropriate and the evidence is admitted, a review of its sufficiency is not foreclosed:

> [I]n the event the trial court concludes that the scintilla of evidence presented supporting a position is insufficient to allow a reasonable

> juror to conclude that the position more likely than not is true, the court remains free to direct a judgment . . . and likewise to grant summary judgment.

509 U.S. at 595.

The Court cited two Bendectin decisions in support of this statement, *Turpin*, 959 F.2d 1349, and *Brock v. Merrell Dow Pharmaceuticals, Inc.*, 874 F.2d 307 (5th Cir.), *modified on reh'g*, 884 F.2d 166 (5th Cir. 1989). In *Turpin*, the Sixth Circuit held that the scientific evidence, viewed in the light most favorable to the plaintiffs, was not sufficient to allow a jury to find that it was more probable than not that the defendant caused the injury. *Turpin*, 959 F.2d at 1350. In *Brock*, the Fifth Circuit reversed a judgment entered on a jury verdict because the evidence of causation was legally insufficient. *Brock*, 874 F.2d at 315; *see also Raynor v. Merrell Pharms. Inc.*, 104 F.3d 1371, 1376 (D.C. Cir. 1997) (affirming judgment notwithstanding the verdict and noting that even if expert testimony were admissible under *Daubert*, it was "unlikely" that a jury could reasonably find it sufficient to show causation).

As already discussed, a number of other decisions in the Bendectin litigation have held that the causation evidence was legally insufficient, sometimes setting aside a jury verdict and in other cases granting summary judgment or a directed verdict. *See supra* at ___. The decision in *Richardson* said in no uncertain terms that the trial court did not err in granting judgment notwithstanding the verdict because "[w]hether an expert's opinion has an adequate basis" is an issue "falling within the province of the court." 857 F.2d at 833.

There are many decisions outside the Bendectin litigation that have examined the reliability of scientific evidence in a review of the legal sufficiency of the evidence. *See, e.g., Conde v. Velsicol Chem. Corp.*, 24 F.3d 809, 813 (6th Cir. 1994) (stating that even if evidence is admissible under *Daubert*, it can still be legally insufficient to withstand summary judgment); *Wade-Greaux v. Whitehall Labs., Inc.*, 874 F. Supp. 1441, 1485-86 (D.Vi.I) (granting summary judgment in toxic tort case when evidence of causation was insufficient to sustain a jury verdict), *aff'd*, 46 F.3d 1120 (3d Cir. 1994); *see also Vadala v. Teledyne Indus., Inc.*, 44 F.3d 36, 39 (1st Cir. 1995) (noting that even if expert testimony about cause of plane crash were admitted, it would not be sufficient to permit a jury to find in plaintiffs' favor); *In re Paoli*, 35 F.3d at 750 n.21 ("[I]f the scintilla of evidence presented is insufficient to allow a reasonable juror to conclude that the position more likely than not is true, the court remains free to direct a judgment . . . [or] to grant summary judgment."); *cf. In re Joint E. & S. Dist. Asbestos Litig.*, 52 F.3d 1124, 1131-37 (2d Cir. 1995) (finding evidence of causation in asbestos case legally sufficient and reversing trial court's judgment notwithstanding the verdict); *Gruca v. Alpha Therapeutic Corp.*, 51 F.3d 638, 643 (7th Cir. 1995) (holding that trial court abdicated its responsibility by refusing to rule on admissibility and by instructing a verdict for the defendant in a blood bank case; assuming admissibility of the evidence, it would be legally sufficient). *But see Joiner v. General Elec. Co.*, 78 F.3d 524, 534 (11th Cir. 1996) (Birch, J., concurring) (stating that the sufficiency and weight of evidence are beyond the scope of a *Daubert* analysis), *cert. granted*, 117 S. Ct. 1243 (1997).

In *Robinson*, we set forth some of the factors that courts should consider in looking beyond the bare opinion of the expert. Those factors include:

(1) the extent to which the theory has been or can be tested;

(2) the extent to which the technique relies upon the subjective interpretation of the expert;

(3) whether the theory has been subjected to peer review and publication;

(4) the technique's potential rate of error;

(5) whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and

(6) the non-judicial uses that have been made of the theory or technique.

See Robinson, 923 S.W.2d at 557. The issue in *Robinson* was admissibility of evidence, but as we have explained the same factors may be applied in a no evidence review of scientific evidence.

If the foundational data underlying opinion testimony are unreliable, an expert will not be permitted to base an opinion on that data because any opinion drawn from that data is likewise unreliable. Further, an expert's testimony is unreliable even when the underlying data are sound if the expert draws conclusions from that data based on flawed methodology. A flaw in the expert's reasoning from the data may render reliance on a study unreasonable and render the inferences drawn therefrom dubious. Under that circumstance, the expert's scientific testimony is unreliable and, legally, no evidence.

We next consider some of the difficult issues surrounding proof of causation in a toxic tort case such as this.

IV

The Havners do not contend that all limb reduction birth defects are caused by Bendectin or that Bendectin always causes limb reduction birth defects even when taken at the critical time of limb development. Experts for the Havners and Merrell Dow agreed that some limb reduction defects are genetic. These experts also agreed that the cause of a large percentage of limb reduction birth defects is unknown. Given these undisputed facts, what must a plaintiff establish to raise a fact issue on whether Bendectin caused an individual's birth defect? The question of causation in cases like this one has engendered considerable debate. Courts that have addressed the issue have not always agreed, and commentators have expressed widely divergent views on the quantum and quality of evidence necessary to sustain a recovery.

Sometimes, causation in toxic tort cases is discussed in terms of general and specific causation. *See, e.g., Raynor v. Merrell Pharms., Inc.*, 104 F.3d 1371, 1376 (D.C. Cir. 1997); Joseph Sanders, *From Science to Evidence: The Testimony on Causation in the Bendectin Cases*, 46 STAN. L. REV. 1, 14 (1993). General causation is whether a substance is capable of causing a particular injury or condition in the general population, while specific causation is whether a substance caused a particular individual's injury. In some cases, controlled scientific experiments can be carried out

to determine if a substance is capable of causing a particular injury or condition, and there will be objective criteria by which it can be determined with reasonable certainty that a particular individual's injury was caused by exposure to a given substance. However, in many toxic tort cases, direct experimentation cannot be done, and there will be no reliable evidence of specific causation.

In the absence of direct, scientifically reliable proof of causation, claimants may attempt to demonstrate that exposure to the substance at issue increases the risk of their particular injury. The finder of fact is asked to infer that because the risk is demonstrably greater in the general population due to exposure to the substance, the claimant's injury was more likely than not caused by that substance. Such a theory concedes that science cannot tell us what caused a particular plaintiff's injury. It is based on a policy determination that when the incidence of a disease or injury is sufficiently elevated due to exposure to a substance, someone who was exposed to that substance and exhibits the disease or injury can raise a fact question on causation. *See generally Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1320 n.13 (9th Cir.) (on remand), *cert. denied*, 116 S. Ct. 189 (1995). The Havners rely to a considerable extent on epidemiological studies for proof of general causation. Accordingly, we consider the use of epidemiological studies and the "more likely than not" burden of proof.

A

Epidemiological studies examine existing populations to attempt to determine if there is an association between a disease or condition and a factor suspected of causing that disease or condition. *See, e.g., Bert Black & David E. Lilienfeld, Epidemiologic Proof in Toxic Tort Litigation,* 52 FORDHAM L. REV. 732, 750 (1984). However, witnesses for the Havners and commentators in this area uniformly acknowledge that epidemiological studies cannot establish that a given individual contracted a disease or condition due to exposure to a particular drug or agent. *See, e.g.,* Michael Dore, *A Commentary on the Use of Epidemiological Evidence in Demonstrating Cause-In-Fact,* 7 HARV. ENVTL. L. REV. 429, 431-35 (1983); Steve Gold, *Causation in Toxic Torts: Burdens of Proof, Standards of Persuasion, and Statistical Evidence,* 96 YALE L.J. 376, 380 (1986). Dr. Glasser, a witness for the Havners, gave as an example a study designed to see if a given drug causes rashes. Even though a study may show that ten people who took the drug exhibited a rash, while rashes appeared on only three people who did not take the drug, Dr. Glasser explained that the study cannot tell us which of the exposed ten got the rash because of the drug. We know that things other than the drug cause rashes.

Recognizing that epidemiological studies cannot establish the actual cause of an individual's injury or condition, a difficult question for the courts is how a plaintiff faced with this conundrum can raise a fact issue on causation and meet the "more likely than not" burden of proof. Generally, more recent decisions have been willing to recognize that epidemiological studies showing an increased risk may support a recovery. Judge Weinstein,

whose decision in the Agent Orange litigation has been widely discussed and followed, has observed that courts have been divided between the "strong" and "weak" versions of the preponderance rule. *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1223, 1261 (E.D.N.Y. 1985) (citing David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 851, 857 (1984)). The "strong" version requires a plaintiff to offer both epidemiological evidence that the probability of causation exceeds fifty percent in the exposed population and "particularistic" proof that the substance harmed the individual. The "weak" version allows verdicts to be based solely on statistical evidence. Rosenberg, *supra*, 97 HARV. L. REV. at 857-58. Judge Weinstein concluded that the plaintiffs in *Agent Orange* were required to offer evidence that causation was "more than 50 percent probable," 611 F. Supp. at 1262, and that the plaintiffs' experts were required to "rule out the myriad other possible causes of the veterans' afflictions," *id.* at 1263.

Other courts have likewise found that the requirement of a more than 50% probability means that epidemiological evidence must show that the risk of an injury or condition in the exposed population was more than double the risk in the unexposed or control population. *See, e.g., Daubert*, 43 F.3d at 1320 (requiring Bendectin plaintiffs to show that mothers' ingestion of the drug more than doubled the likelihood of birth defects); *DeLuca v. Merrell Dow Pharms., Inc.*, 911 F.2d 941, 958 (3d Cir. 1990) (requiring that Bendectin plaintiffs establish relative risk of limb reduction defects arising from epidemiological

data of at least 2.0, which equates to more than a doubling of the risk); *Hall v. Baxter Healthcare Corp.*, 947 F. Supp. 1387, 1403 (D. Or. 1996) (requiring breast-implant plaintiffs to demonstrate that exposure to breast implants more than doubled the risk of their alleged injuries, which, in epidemiological terms, requires a relative risk of more than 2.0); *Manko v. United States*, 636 F. Supp. 1419, 1434 (W.D. Mo. 1986) (stating that a relative risk of 2.0 in an epidemiological study means that the disease more likely than not was caused by the event), *aff'd in relevant part*, 830 F.2d 831 (8th Cir. 1987); *Marder v. G.D. Searle & Co.*, 630 F. Supp. 1087, 1092 (D. Md. 1986) (stating that in IUD litigation, a showing of causation by a preponderance of the evidence, in epidemiological terms, requires a relative risk of at least 2.0), *aff'd*, 814 F.2d 655 (4th Cir. 1987); *Cook v. United States*, 545 F. Supp. 306, 308 (N.D. Cal. 1982) (stating that in vaccine case, when relative risk is greater than 2.0, there is a greater than 50% chance that the injury was caused by the vaccine).

Some courts have reached a contrary conclusion, holding that epidemiological evidence showing something less than a doubling of the risk may support a jury's finding of causation. In *In re Joint Eastern & Southern District Asbestos Litigation*, 52 F.3d 1124, 1134 (2d Cir. 1995), the Second Circuit observed that the district court cited no authority for the "bold" assertion that standardized mortality ratios of 1.5 are statistically insignificant and cannot be relied upon by a jury. The circuit court held that it was far preferable to instruct the jury on statistical significance and to let the jury decide whether studies over the 1.0 mark have any significance. *Id.; see also Allen v. United States*, 588 F. Supp. 247, 418-19 (D.

Utah 1984) (explicitly rejecting the greater than 50% standard of causation in connection with statistical evidence), *rev'd on other grounds*, 816 F.2d 1417 (10th Cir. 1987); *Grassis v. Johns-Manville Corp.*, 591 A.2d 671, 674-76 (N.J. Super. Ct. App. Div. 1991) (holding that trial court erred in precluding opinion testimony based on epidemiological studies showing relative risks of less than 2.0).

The "doubling of the risk" issue in toxic tort cases has provided fertile ground for the scholarly plow. Those who advocate that something short of a doubling of the risk is adequate to support liability or who advocate that some type of proportionate liability should be imposed include Daniel A. Farber, *Toxic Causation*, 71 MINN. L. REV. 1219, 1237-51 (1987); Gold, *supra*, 96 YALE L.J. at 395-401; Khristine L. Hall & Ellen K. Silbergeld, *Reappraising Epidemiology: A Response to Mr. Dore*, 7 HARV. ENVTL. L. REV. 441, 445-46 (1983); Rosenberg, *supra*, 97 HARV. L. REV. at 859-60; *see also* 2 AMERICAN LAW INST., ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 369-75 (1991) (discussing toxic tort cases and suggesting that proportionate compensation to all with the disease or disorder should be based on the attributable fractions of causation); D.H. Kaye, *Apples and Oranges: Confidence Coefficients and the Burden of Persuasion*, 73 CORNELL L. REV. 54, 71-73 (1987).

On the other end of the spectrum is Michael Dore, who asserts that epidemiological studies cannot, standing alone, establish causation. *See* Dore, *A Commentary on the Use of Epidemiological Evidence*, *supra*, 7 HARV. ENVTL. L. REV. at 434; *see also* Michael D. Green, *Expert Witnesses and Sufficiency of Evidence in Toxic Substances Litigation: The Legacy of Agent Orange and Bendectin Litigation*, 86 NW. U.L. REV. 643, 691 (1992) (concluding that in the absence

of other information, a doubling of the risk would be inadequate to support a plaintiff's verdict, but advocating that a lower risk might be sufficient if other risk factors could be eliminated); Melissa Moore Thompson, *Causal Inference in Epidemiology: Implications for Toxic Tort Litigation*, 71 N.C. L. REV. 247, 253, 289 (1992) (arguing that a strong association requires a risk ratio greater than or equal to 8.0, although moderate association of 3.0 to 8.0 could suffice if coupled with other factors).

Some commentators have been particularly critical of attempts by the courts to meld the more than 50% probability requirement with the relative risks found in epidemiological studies in determining if the studies were admissible or were some evidence that would support an award for the claimant. But there is disagreement on how epidemiological studies should be used. Some commentators contend that the more than 50% probability requirement is too stringent, while others argue that epidemiological studies have no relation to the legal requirement of "more likely than not." *Compare* Gold, *supra*, 96 YALE L.J. at 395-97 (advocating a relaxed threshold of proof), *with* Diana B. Petitti, *Reference Guide on Epidemiology*, 36 JURIMETRICS J. 159, 167-68 (1996) (finding no support in textbooks of epidemiology or from empirical studies for the proposition that when attributable risk exceeds 50% an agent is more likely than not to be the cause of the plaintiff's disease), *and* Thompson, *supra*, 71 N.C. L. REV. at 264-65 (asserting that the use of statistical association to satisfy a more likely than not standard is "misguided"). *See also* Carl F. Cranor et al., *Judicial Boundary Drawing and the Need for Context-Sensitive Science in Toxic Torts after* Daubert v. Merrell Dow Pharmaceuticals,

Inc., 16 VA. ENVTL. L.J. 1, 37-40 (1996) (arguing that epidemiological evidence should not be excluded simply because it reveals a relative risk less than 2.0, unless there is no other supporting evidence); Kaye, *supra*, 73 CORNELL L. REV. at 69 (arguing that it is fallacious to reason that "if the data are more probable under one hypothesis than another, then the former hypothesis is more likely to be true than the latter"); James Robins & Sander Greenland, *The Probability of Causation Under a Stochastic Model for Individual Risk*, 45 BIOMETRICS 1125, 1131 (1989) (concluding that proportional liability schemes cannot be based on epidemiological data alone).

B

Although we recognize that there is not a precise fit between science and legal burdens of proof, we are persuaded that properly designed and executed epidemiological studies may be part of the evidence supporting causation in a toxic tort case and that there is a rational basis for relating the requirement that there be more than a "doubling of the risk" to our no evidence standard of review and to the more likely than not burden of proof. *See generally DeLuca v. Merrell Dow Pharms., Inc.*, 911 F.2d 941, 958-59 (3d Cir. 1990); Black & Lilienfeld, *supra*, 52 FORDHAM L. REV. at 767; *see also Daubert*, 43 F.3d at 1321; *Cook*, 545 F. Supp. at 308.

Assume that a condition naturally occurs in six out of 1,000 people even when they are not exposed to a certain drug. If studies of people who *did* take the drug show that nine out of 1,000 contracted the disease, it is still more likely than not that causes other than the drug were

responsible for any given occurrence of the disease since it occurs in six out of 1,000 individuals anyway. Six of the nine incidences would be statistically attributable to causes other than the drug, and therefore, it is not more probable that the drug caused any one incidence of disease. This would only amount to evidence that the drug *could* have caused the disease. However, if more than twelve out of 1,000 who take the drug contract the disease, then it may be *statistically* more likely than not that a given individual's disease was caused by the drug.

This is an oversimplification of statistical evidence relating to general causation, as we discuss below, but it illustrates the thinking behind the doubling of the risk requirement. For another viewpoint in this same vein, see ROBERT P. CHARROW & DAVID E. BERNSTEIN, WASHINGTON LEGAL FOUNDATION, SCIENTIFIC EVIDENCE IN THE COURTROOM: ADMISSIBILITY AND STATISTICAL SIGNIFICANCE AFTER *DAUBERT* 28-34 (1994), who advocate that there is a mathematically demonstrable relationship between relative risk and the more likely than not standard. They contend that a relative risk of slightly more than 2.0 will rarely, if ever, satisfy the legal causation standard. From a mathematical perspective, the probability of general causation changes as the level of statistical significance changes. *Id.* at 29-31. A relative risk of 2.2 may be sufficient to show more than a 50% probability at the 0.05 level (5 chances out of 100 that result occurred by chance), but not at the 0.10 level (10 chances out of 100). With calculations that we do not attempt to set out here, these commentators offer an example in which a relative risk ratio of 2.75 results in a probability of general causation of about 52% with a

statistical significance of 0.05, but only about a 43% probability of general causation with a statistical significance of 0.10. *Id.* at 31-32.

We recognize, as does the federal *Reference Manual on Scientific Evidence*, that a disease or condition either is or is not caused by exposure to a suspected agent and that frequency data, such as the incidence of adverse effects in the general population when exposed, cannot indicate the actual cause of a given individual's disease or condition. *See* Linda A. Bailey et al., *Reference Guide on Epidemiology, in* FEDERAL JUDICIAL CENTER, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 169 (1994). But the law must balance the need to compensate those who have been injured by the wrongful actions of another with the concept deeply imbedded in our jurisprudence that a defendant cannot be found liable for an injury unless the preponderance of the evidence supports cause in fact. The use of scientifically reliable epidemiological studies and the requirement of more than a doubling of the risk strikes a balance between the needs of our legal system and the limits of science.

C

We do not hold, however, that a relative risk of more than 2.0 is a litmus test or that a single epidemiological test is legally sufficient evidence of causation. Other factors must be considered. As already noted, epidemiological studies only show an association. There may in fact be no causal relationship even if the relative risk is high. For example, studies have found that there is an association between silicone breast implants and reduced rates of

breast cancer. This does not necessarily mean that breast implants caused the reduced rate of breast cancer. *See* David E. Bernstein, *The Admissibility of Scientific Evidence After* Daubert v. Merrell Dow Pharmaceuticals, Inc., 15 CARDOZO L. REV. 2139, 2167 (1994) (citing H. Berkel et al., *Breast Augmentation: A Risk Factor for Breast Cancer?*, 326 NEW ENG. J. MED. 1649 (1992)). Likewise, even if a particular study reports a low relative risk, there may in fact be a causal relationship. The strong consensus among epidemiologists is that conclusions about causation should not be drawn, if at all, until a number of criteria have been considered. One set of criteria widely used by epidemiologists was published by Sir Austin Bradford Hill in 1965.[2] Another set of criteria used by epidemiologists in

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[2] The Bradford Hill criteria are summarized as follows:

1. Strength of association. "First upon my list I would put the strength of association. To take a very old example, by comparing the occupations of patients with scrotal cancer with the occupations of patients presenting with other diseases, Percival Pott could reach the correct conclusion because of the enormous increase of scrotal cancer in the chimney sweeps."

2. Consistency. "Next on my list of features to be specifically considered I would place the consistency of association. Has it been repeatedly observed by different persons, in different places, circumstances and times?"

3. Specificity. "If . . . the association is limited to specific workers and to particular sites and types of disease and there is no association between the work and other modes of dying, then clearly that is a strong argument in favor of causation."

studying disease is the Henle-Koch-Evans Postulates.[3] Although epidemiologists do not consider it necessary

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> 4. Temporality. "Which is the cart and which the horse?"
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> 5. Biological gradient. "Fifthly, if the association is one which can reveal a biological gradient, or dose-response curve, then we should look most carefully for such evidence. . . . The clear-dose response curve admits of a simple explanation and obviously puts the case in a clearer light."
>
> 6. Plausibility. "It would be helpful if the causation we suspect is biologically plausible. But this is a feature I am convinced we cannot demand. What is biologically plausible depends on the biological knowledge of the day."
>
> 7. Coherence. "The cause-and-effect interpretation of our data should not seriously conflict with the generally known facts of the natural history and biology of the disease."
>
> 8. Experiment. "Occasionally it is possible to appeal to experimental . . . evidence. . . . Here the strongest support for the causation hypothesis may be revealed."
>
> 9. Analogy. "In some circumstances it would be fair to judge by analogy. With the effects of thalidomide and rubella before us we would surely be ready to accept slighter but similar evidence with another drug or another viral disease in pregnancy."

Bernstein, *supra*, 15 CARDOZO L. REV. at 2167-68 (quoting Austin Bradford Hill, *The Environment and Disease: Association or Causation?*, 58 PROC. ROYAL SOC'Y MED. 295, 299 (1965)); *see also* Thompson, *supra*, 71 N.C. L. REV. at 268-74.

[3] *See, e.g.*, Black & Lilienfeld, *supra*, 52 FORDHAM L. REV. at 762-63; Christopher L. Callahan, *Establishment of Causation in Toxic Tort Litigation*, 23 ARIZ. ST. L.J. 605, 626 (1991); Michael Dore, *A Proposed Standard For Evaluating the Use of*

that all these criteria be met before drawing inferences about causation, they are part of sound methodology generally accepted by the current scientific community.

Sound methodology also requires that the design and execution of epidemiological studies be examined. For example, bias can dramatically affect the scientific reliability of an epidemiological study. *See, e.g.*, Bailey et al., *Reference Guide on Epidemiology, in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE, *supra*, at 138-43; Thompson, *supra*, 71 N.C. L. REV. at 259-61. Bias can result from confounding factors, selection bias, and information bias. Thompson, *supra*, 71 N.C. L. REV. at 260. We will not undertake an extended discussion of the many ways in which bias may cause results of a study to be misleading. We note only that epidemiological studies "are subject to many biases and therefore present formidable problems in design and execution and even greater problems in interpretation." Marcia Angell, *The Interpretation of Epidemiologic Studies*, 323 NEW ENG. J. MED. 823, 824 (1996).

We also note that some of the literature indicates that epidemiologists consider a relative risk of less than three to indicate a weak association. *See* Thompson, *supra*, 71 N.C. L. REV. at 252 (citing Ernest L. Wynder, *Guidelines to the Epidemiology of Weak Associations*, 16 PREVENTIVE MED. 139, 139 (1987)). The executive editor of the New England Journal of Medicine, Marcia Angell, has stated that "[a]s a general rule of thumb, we are looking for a relative risk

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Epidemiological Evidence in Toxic Tort and other Personal Injury Cases, 28 HOW. L.J. 677, 691 (1985); *see also* Bailey et al., *Reference Guide on Epidemiology, in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE, *supra*, at 160-64.

of three or more [before accepting a paper for publication], particularly if it is biologically implausible or if it's a brand-new finding." Gary Taubes, *Epidemiology Faces Its Limits*, SCIENCE, July 14, 1995, at 168. Similarly, Robert Temple, the director of drug evaluation at the FDA, has said that "[m]y basic rule is if the relative risk isn't at least three or four, forget it." *Id.* We hasten to point out that these statements are contained in what is more akin to the popular press, not peer-reviewed scientific journals, and the context of those statements is not altogether clear. We draw no conclusions from any of the foregoing articles other than to point out that there are a number of reasons why reliance on a relative risk of 2.0 as a bright-line boundary would not be in accordance with sound scientific methodology in some cases. Careful exploration and explication of what is reliable scientific methodology in a given context is necessary.

D

A few courts that have embraced the more-than-double-the-risk standard have indicated in dicta that in some instances, epidemiological studies with relative risks of less than 2.0 might suffice if there were other evidence of causation. *See, e.g., Daubert*, 43 F.3d at 1321 n.16; *Hall*, 947 F. Supp. at 1398, 1404. We need not decide in this case whether epidemiological evidence with a relative risk less than 2.0, coupled with other credible and reliable evidence, may be legally sufficient to support causation. We emphasize, however, that evidence of causation from whatever source must be scientifically reliable. Post hoc, speculative testimony will not suffice.

A physician, even a treating physician, or other expert who has seen a skewed data sample, such as one of a few infants who has a birth defect, is not in a position to infer causation. The scientific community would not accept as methodologically sound a "study" by such an expert reporting that the ingestion of a particular drug by the mother caused the birth defect. Similarly, an expert's assertion that a physical examination confirmed causation should not be accepted at face value. In *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090 (7th Cir. 1994), a treating physician testified that he knew what radiation-induced cataracts looked like because they are clinically describable and definable and "cannot be mistaken for anything else." *Id.* at 1106. Nevertheless, his opinion that exposure to radiation caused the plaintiff's cataracts was found to be inadmissible because it had no scientific basis. The literature on which the expert relied did not support his assertion that radiation-induced cataracts could be diagnosed by visual examination. *Id.* at 1106-07. For a good discussion of the evils of "evidence" of this nature, see Bernstein, *supra*, 15 CARDOZO L. REV. at 2148-49. Further, as we discuss in Part VI(A), an expert cannot dissect a study, picking and choosing data, or "reanalyze" the data to derive a higher relative risk if this process does not comport with sound scientific methodology.

The FDA has promulgated regulations that detail the requirements for clinical investigations of the safety and effectiveness of drugs. 21 C.F.R. § 314.126 (1996). These regulations state that "[i]solated case reports, random experience, and reports lacking the details which permit scientific evaluation will not be considered." *Id.*

§ 314.126(e). Courts should likewise reject such evidence because it is not scientifically reliable. As Bernstein points out, physicians following scientific methodology would not examine a patient or several patients in uncontrolled settings to determine whether a particular drug has favorable effects, nor would they rely on case reports to determine whether a substance is harmful. *See* Bernstein, *supra*, 15 CARDOZO L. REV. at 2148-49; *see also* Rosenberg, *supra*, 97 HARV. L. REV. at 870 (arguing that anecdotal or particularized evidence accomplishes no more than a false appearance of direct and actual knowledge of a causal relationship). Expert testimony that is not scientifically reliable cannot be used to shore up epidemiological studies that fail to indicate more than a doubling of the risk.

E

To raise a fact issue on causation and thus to survive legal sufficiency review, a claimant must do more than simply introduce into evidence epidemiological studies that show a substantially elevated risk. A claimant must show that he or she is similar to those in the studies. This would include proof that the injured person was exposed to the same substance, that the exposure or dose levels were comparable to or greater than those in the studies, that the exposure occurred before the onset of injury, and that the timing of the onset of injury was consistent with that experienced by those in the study. *See generally* Thompson, *supra*, 71 N.C. L. REV. at 286-88. Further, if there are other plausible causes of the injury or condition that could be negated, the plaintiff must offer evidence

excluding those causes with reasonable certainty. *See generally E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 559 (Tex. 1995) (finding that the failure of the expert to rule out other causes of the damage rendered his opinion little more than speculation); *Parker v. Employers Mut. Liab. Ins. Co.*, 440 S.W.2d 43, 47 (Tex. 1969) (holding that a cause becomes "probable" only when "in the absence of other reasonable causal explanations it becomes more likely than not that the injury was a result").

In sum, we emphasize that courts must make a determination of reliability from all the evidence. Courts should allow a party, plaintiff or defendant, to present the best available evidence, assuming it passes muster under *Robinson*, and only then should a court determine from a totality of the evidence, considering all factors affecting the reliability of particular studies, whether there is legally sufficient evidence to support a judgment.

Finally, we are cognizant that science is constantly reevaluating conclusions and theories and that over time, not only scientific knowledge but scientific methodology in a particular field may evolve. We have strived to make our observations and holdings in light of current, generally accepted scientific methodology. However, courts should not foreclose the possibility that advances in science may require reevaluation of what is "good science" in future cases.

V

Certain conventions are used in conducting scientific studies, and statistics are used to evaluate the reliability

of scientific endeavors and to determine what the results tell us. In this opinion, we consider some of the basic concepts currently used in scientific studies and statistical analyses and how those concepts mesh with our legal sufficiency standard of review. For an extended discussion of statistical methodology and its use in epidemiological studies, see *DeLuca v. Merrell Dow Pharmaceuticals, Inc.*, 911 F.2d 941, 945-48 (3d Cir. 1990). *See also Turpin v. Merrell Dow Pharms., Inc.*, 959 F.2d 1349, 1353 n.1 (6th Cir. 1992); Bailey et al., *Reference Guide on Epidemiology, in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE, *supra*, at 138-43, 171-78. We do not attempt to discuss all the multifaceted aspects of the scientific method and statistics, but focus on the principles that shed light on the particular facts and issues in this case.

A

One way to study populations is by a retrospective case-control or case-comparison epidemiological study. For example, this type of study identifies individuals with a disease and a suitable control group of people without the disease and then looks back to examine postulated causes of the disease. *See* Bailey et al., *Reference Guide on Epidemiology, in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE, *supra*, at 136-38, 172. Another type of epidemiological study is a cohort study, or incidence study, which is a prospective study that identifies groups and observes them over time to see if one group is more likely to develop disease. *Id.* at 134-36, 173.

An "odds ratio" can be calculated for a case-control study. *Id.* at 175. For example, an odds ratio could be used

to show the odds that ingestion of a drug is associated with a particular disease. The odds ratio compares the odds of having the disease when exposed to the drug versus when not exposed. If the ratio is 2.67, the odds are that a person exposed to the drug is 2.67 times more likely to develop the disease under study.

Similarly, the "relative risk" that a person who took a drug will develop a particular disease can be determined in a cohort study. *Id.* at 173, 176. The relative risk is calculated by comparing the incidence of disease in the exposed population with the incidence of the disease in the control population. If the relative risk is 1.0, the risk in exposed individuals is the same as unexposed individuals. If the relative risk is greater than 1.0, the risk in exposed individuals is greater than in those not exposed. If the relative risk is less than 1.0, the risk in exposed individuals is less than in those not exposed. For the result to indicate a doubling of the risk, the relative risk must be greater than 2.0. *See id.* at 147-48.

Perhaps the most useful measure is the attributable proportion of risk, which is the statistical measure of a factor's relationship to a disease in the population. It represents the "proportion of the disease among exposed individuals that is associated with the exposure." *Id.* at 149. In other words, it reflects the percentage of the disease or injury that could be prevented by eliminating exposure to the substance. For a more detailed discussion of the calculation and use of the attributable proportion of risk, *see id.* at 149-50; Black & Lilienfeld, *supra*, 52 FORDHAM L. REV. at 760-61. *See also* Thompson, *supra*, 71 N.C. L. REV. at 252-56.

The numeric value of an odds ratio is at least equal to the relative risk, but the odds ratio often overstates the relative risk, especially if the occurrence of the event is not rare. For an example of the difference between the mathematical calculation of the odds ratio and the relative risk, see BARBARA HAZARD MUNRO & ELLIS BATTEN PAGE, STATISTICAL METHODS FOR HEALTH CARE RESEARCH 233-35 (2d ed. 1993). In the example given by Munro and Page, the odds ratio was 3.91, while the relative risk was only 3.0 based on the same set of data. *See also* Bailey et al., *Reference Guide on Epidemiology, in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE, *supra*, at 149; Thompson, *supra*, 71 N.C. L. REV. at 250 n.22.

The relative risk may be expressed algebraically as:

$$RR = I_e \div I_c$$

where RR is the relative risk, I_e is the incidence of the disease in the exposed population, and I_c is the incidence of disease in the control population. A sample calculation is as follows:

- the incidence of the disease in exposed individuals (I_e) is 30 cases per 100 persons, or 0.3
- the incidence of the disease in the unexposed individuals (I_c) is 10 cases per 100 persons, or 0.1
- the relative risk is the incidence in the exposed group (0.3) divided by the incidence in the unexposed group (0.1), which equals 3.0

Using this hypothetical, can we conclude that people who are exposed are three times more likely to contract disease than those who are not? Not necessarily. The

result in any given study or comparison may not be representative of the entire population. The result may have occurred by chance. The discipline of statistics has determined means of telling us how significant the results of a study may be.

B

The first step in understanding significance testing is to understand how research is often conducted. A researcher tests hypotheses and does so by testing whether the data support a particular hypothesis. The starting point is the null hypothesis, which assumes that there is no difference or no effect. If you were studying the effects of Bendectin, for example, the null hypothesis would be that it has no effect. The researcher tries to find evidence *against* the hypothesis. *See* DAVID S. MOORE & GEORGE P. MCCABE, INTRODUCTION TO THE PRACTICE OF STATISTICS 449 (2d ed. 1993); MUNRO & PAGE, *supra*, at 54. The statement that the researcher suspects may be true is stated as the alternative hypothesis. If a significant difference is found, the null hypothesis is rejected. If a significant difference is not found, the null hypothesis is accepted. MUNRO & PAGE, *supra*, at 54. This concept is important because it is the basis of the statistical test. *Id.*

A study may contain error in deciding to reject or accept a hypothesis, and this error can be one of two types. *Id.*; MOORE & MCCABE, *supra*, at 482-87. A Type I error occurs when the null hypothesis is true but has been rejected, and a Type II error occurs when the null hypothesis is false but has been accepted. MUNRO & PAGE, *supra*, at 55. An example of the two types of error given

by Munro and Page is a comparison of two groups of people who have been taught statistics by different methods. *Id.* Group A scored significantly higher than Group B on a test of their knowledge of statistics. The null hypothesis is that there is no difference between the teaching methods, but because the study indicated there was a difference, the null hypothesis was rejected. Suppose, however, that Group A was composed of people with higher math ability and that in actuality the teaching method did not matter at all. The rejection of the null hypothesis is a Type I error. *Id.*

The probability of making a Type I error can be decreased by changing the level of significance, that is, the probability that the results occurred by chance. *Id.* If the level of significance had been five in one hundred (0.05), there is only a five in one hundred chance that the result occurred by chance alone. If the level of significance is one in one hundred (0.01), there is only a one in one hundred chance that the result occurred by chance alone. However, as the significance level is made more stringent (*e.g.*, from 0.05 to 0.01), it will be more difficult to find a significant result. *Id.* Altering the significance level in this manner also increases the risk of a Type II error, which is accepting a false null hypothesis. *Id.* To avoid Type II errors, the level of significance can be lowered, for example, to ten in one hundred (0.1). *Id.*

Different levels of significance may be appropriate for different types of studies depending on how much risk one is willing to accept that the conclusion reached is wrong. Again, to take examples offered by Munro and Page, assume that a test for a particular stage, a child with the defect can be successfully treated. If the genetic

defect is not diagnosed in time, the child's development will be severely impaired. If a child is mistakenly diagnosed as having the defect and treated, there are no harmful effects. Most would agree that it would be preferable to make a Type I error rather than a Type II error under these circumstances. *Id.* A Type II error would be failing to diagnose a child that had the genetic defect.

Contrast that hypothetical with one in which a federal study is conducted to determine whether a particular method of teaching underprivileged children increases their success in school. *Id.* The cost of implementing this teaching method in a nationwide program would be very great. A Type I error would be to conclude that the program had an effect when it did not. *Id.* The significance level for this project would probably be higher than the one used to screen for genetic defects in the other hypothetical. In the genetic defects example, it is preferable to treat children even if they may not have the disease, but in the teaching method example, it is not preferable to teach children at considerable cost if it has no effect.

A confidence level can be used in epidemiological studies to establish the boundaries of the relative risk. These boundaries are known as the confidence interval. *See id.* at 59-63; *see also* David H. Kaye & David A. Freedman, *Reference Guide on Statistics, in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE, *supra*, at 376-77, 396; MOORE & MCCABE, *supra*, at 432-37. The confidence interval tells us if the results of a given study are statistically significant at a particular confidence level. *See* MOORE & MCCABE, *supra*, at 432-33. A confidence interval shows a "range of values within which the results of a study sample would

be likely to fall if the study were repeated numerous times." Bailey et al., *Reference Guide on Epidemiology, in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE, *supra*, at 173. If, based on a confidence level of 95%, a study showed a relative risk of 2.3 and had a confidence interval of 1.3 to 3.8, we would say that, if the study were repeated, it would produce a relative risk between 1.3 and 3.8 in 95% of the repetitions. However, if the interval includes the number 1.0, the study is not statistically significant or, said another way, is inconclusive. This is because the confidence interval includes relative risk values that are both less than and greater than the null hypothesis (1.0), leaving the researcher with results that suggest both that the null hypothesis should be accepted and that it should be rejected. *See, e.g., Turpin*, 959 F.2d at 1353 n.1; *Brock v. Merrell Dow Pharms., Inc.*, 874 F.2d 307, 312 (5th Cir.), *as modified on reh'g*, 884 F.2d 166 (5th Cir. 1989); Bailey et al., *Reference Guide on Epidemiology, in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE, *supra*, at 173. This concept was explained to the jury in this case by Dr. Glasser, one of the Havners' witnesses. Thus, a study may produce a relative risk of 2.3, meaning the risk is 2.3 times greater based on the data, but at a confidence level of 95%, the confidence interval has boundaries of 0.8 and 3.2. The results are therefore insignificant at the 95% level. If the researcher is willing to accept a greater risk of error and lowers the confidence level to 90%, the results may be statistically significant at that lower level because the range does not include the number 1.0. *See generally* Bailey et al., *Reference Guide on Epidemiology, in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE, *supra*, at 151-55. "[T]he

narrower the confidence interval, the greater the confidence in the relative risk estimate found in the study." *Id.* at 173.

C

The generally accepted significance level or confidence level in epidemiological studies is 95%, meaning that if the study were repeated numerous times, the confidence interval would indicate the range of relative risk values that would result 95% of the time. *See DeLuca v. Merrell Dow Pharms., Inc.*, 791 F. Supp. 1042, 1046 (D.N.J. 1992), *aff'd*, 6 F.3d 778 (3d Cir. 1993); Bailey et al., *Reference Guide on Epidemiology, in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE, *supra*, at 153; Dore, *A Proposed Standard*, *supra* note 3, 28 HOW. L.J. at 693; Thompson, *supra*, 71 N.C. L. REV. at 256. Virtually all the published, peer-reviewed studies on Bendectin have a confidence level of at least 95%. Although one of the Havners' witnesses, Dr. Swan, advocated the use of a 90% confidence level (10 in 100 chance of error), she and other of the Havners' witnesses conceded that 95% is the generally accepted level.

Another of the Havners' witnesses, Dr. Glasser, explained that in any scientific application, the confidence interval is kept very high. He testified that you "don't ever see [confidence intervals of 50% or 60%] in a scientific study because that means we're going to miss it a lot of times and [scientists] are not willing to take that risk." One commentator advocates that the confidence level for admissibility of epidemiological studies should be higher than the generally accepted 95% and should be 99%. *See* Dore, *A Proposed Standard*, *supra* note 3, 28 HOW.

L.J. at 693-95. *But cf. DeLuca*, 911 F.2d at 948 (discussing statistics expert Kenneth Rothman's view that the predominate choice of a 95% confidence level is an arbitrarily selected convention of his discipline); *Longmore v. Merrell Dow Pharms., Inc.*, 737 F. Supp. 1117, 1119-20 (D. Idaho 1990) (concluding that the scientific standard for determining causation is much stricter than the standard employed by the court and that confidence levels of 95%, 90%, or even 80% should not be required).

We think it unwise to depart from the methodology that is at present generally accepted among epidemiologists. *See generally* Bert Black, *The Supreme Court's View of Science: Has* Daubert *Exorcised the Certainty Demon?*, 15 CARDOZO L. REV. 2129, 2135 (1994) (stating that " '[a]lmost all thoughtful scientists would agree . . . that [a significance level of five percent] is a reasonable general standard' " (quoting Amicus Curiae Brief of Professor Alvan R. Feinstein in Support of Respondent at 16, *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993) (No. 92-102))). Accordingly, we should not widen the boundaries at which courts will acknowledge a statistically significant association beyond the 95% level to 90% or lower values.

It must be reiterated that even if a statistically significant association is found, that association does not equate to causation. Although there may appear to be an increased risk associated with an activity or condition, this does not mean the relationship is causal. As the original panel of the court of appeals observed in this case, there is a demonstrable association between summertime and death by drowning, but summertime does not cause drowning. 907 S.W.2d at 544 n.8.

There are many other factors to consider in evaluating the reliability of a scientific study including, but certainly not limited to, the sample size of the study, the power of the study, confounding variables, and whether there was selection bias. These factors are not central to a resolution of this appeal, and we do no more than acknowledge that determining scientific reliability can have many facets.

VI

Armed with some of the basic principles employed by the scientific community in conducting studies, we turn to an examination of the evidence in this case measured against the *Robinson* factors. *See E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 557 (Tex. 1995). The evidence relied upon by the Havners' experts falls into four categories: (1) epidemiological studies; (2) *in vivo* animal studies; (3) *in vitro* animal studies; and (4) a chemical structure analysis of doxylamine succinate, the antihistamine component of Bendectin. We consider each in turn.

A

Dr. J. Howard Glasser, an associate professor at the University of Texas School of Public Health at the Texas Medical Center in Houston, is an epidemiologist with a Ph.D. in experimental statistics and a Master of Science of Bio-Statistics. He gave the jury an overview of statistics. As noted earlier, he explained that statistics are used to determine if there is a significant association between two

events or occurrences, but cautioned that a statistical association is not the same thing as causation.

Glasser identified a number of epidemiological studies from which he concluded that it was more likely than not that there is an association between Bendectin and birth defects, even though the authors of those studies did not find such an association. One study was done by Cordero and had a relative risk of 1.18 and a confidence interval of 0.65 to 2.13. However, the relative risk would need to exceed 2.0, and the confidence interval could not include 1.0, for the results to indicate more than a doubling of the risk and a statistically significant association between Bendectin and limb reduction birth defects. *See supra* Part V; *see also Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1320 (9th Cir.) (on remand) (noting that more likely than not standard requires, in terms of statistical proof, a more than doubling of the risk), *cert. denied*, 116 S. Ct. 189 (1995). None of the other studies identified by Glasser showed a doubling of the risk. The McCredie study had a relative risk of 1.1 and a confidence interval of 0.8 to 1.5. The data in the Eskanzi study that considered limb reduction birth defects resulted in a relative risk of 4.18, but the confidence interval was 0.48 to 36.3, a very large interval that included 1.0. Dr. Glasser agreed that results with a confidence interval that included 1.0 or a lower number would be inconclusive and statistically insignificant.

Dr. Glasser did, however, reanalzye some data, called the Jick data, that had been included in a report to the FDA. Glasser isolated information on women who had filled two or more prescriptions of Bendectin and who were not exposed to spermicide, which resulted in a

relative risk of 13.0 of limb reduction birth defects. However, the confidence level he used was 90%. Further, there is no testimony or other evidence regarding the confidence interval. The confidence interval may or may not have contained 1.0.

The Havners also point to a memorandum prepared within the FDA that was identified by Dr. Glasser. The document indicates that the relative risk of limb defects when Bendectin is given within the first three lunar months of pregnancy is 2.13. The only conclusion drawn by Dr. Glasser from this memorandum is that, taken in conjunction with the other articles he had discussed, there is an "importance of time" and an "importance of exposure with the highest relative risk coming when the exposure period one to three lunar months is counted." The memo itself was not introduced into evidence, and there is no evidence of the confidence level at which the relative risk of 2.13 was found or of the confidence interval. The confidence interval may or may not have contained 1.0.

Finally, Glasser testified about published studies on Bendectin that did show statistically significant results, but they dealt with birth defects other than limb reduction defects. These studies cannot of course support a finding that Bendectin causes *limb reduction defects.* Further, later studies of these other types of birth defects did not bear out an association with Bendectin.

The other expert witness for the Havners who testified about epidemiological studies was Dr. Shanna Swan. She has a doctorate in statistics and is the Chief of the Reproductive Epidemiological Program for the state of

California. She also teaches epidemiology at the University of California at Berkeley.

Dr. Swan conceded that none of the published epidemiological studies found an association between Bendectin and limb reduction defects. She identified a number of these studies and confirmed that the confidence intervals in each of them included 1.0. However, Dr. Swan testified about these studies at some length and criticized the methodology. Then, relying on these same studies, she opined that Bendectin more probably than not is associated with limb reduction birth defects. Swan considered the findings of these studies in the aggregate and testified that the results fall along a curve in which the "weight of the curve" was in the direction of an increased risk. Yet, she also said that these studies were consistent with a relative risk that was between 0.7 and 1.8. That is not a doubling of the risk. It may support her opinion that it is more probable than not that there is an *association* between Bendectin and limb reduction defects, but the *magnitude* of the association she gleaned from these studies is not more than 2.0, based on her own testimony.

Dr. Swan also performed a reanalysis of data from at least two studies. One reanalysis was of raw *unpublished* data underlying the Jick study of limb reduction birth defects, the same data about which Dr. Glasser testified. Dr. Swan derived a relative risk estimate of 2.2 for women exposed to Bendectin during the first trimester. She also testified that the relative risk for women who were exposed to Bendectin but not exposed to spermicide was 8.8 and finally, that if women who were exposed to two or more Bendectin prescriptions were considered, without regard to exposure to spermicide, the relative

risk was 13 with a confidence interval from 3 to 53. She did not reveal the confidence level used in obtaining these results, and there is no evidence of the confidence level in the record.

The other reanalysis by Dr. Swan was of data in the Cordero study, which was based on information collected by the Center for Disease Control in Atlanta. An abstract she prepared regarding this data was published in the *Journal for the Society of Epidemiological Research* in 1983 or 1984 and states that the original Cordero study found the odds ratio for limb reduction birth defects to be 1.2. Swan concluded, however, that when a different control group is selected, the relative risk estimates are affected. Swan's abstract stated that, "under certain assumptions," which are not identified, "the odds ratio for limb reduction defects" are "a highly significant" 2.8. There is no explanation in the abstract or in Dr. Swan's testimony of the significance level used to obtain the 2.8 result. The result may well be statistically inconclusive at a 95% confidence level. We simply do not know from this record. Without knowing the significance level or the confidence interval, there is no scientifically reliable basis for saying that the 2.8 result is an indication of anything. Further, her choice of the control group could have skewed the results. Although her abstract does not identify what control group she used, Swan testified at trial that she chose births of Downs Syndrome babies. Swan's reanalysis using Downs Syndrome babies as the control group was considered in *Lynch* and in *Richardson*, and those courts likewise found it insufficient. *See Lynch v. Merrell-National Labs.*, 830 F.2d 1190, 1195 (1st Cir. 1987), *aff'd*, 857 F.2d 823 (D.C. Cir. 1988); *Richardson v. Richardson-Merrell, Inc.*, 649

F. Supp. 799, 802 n.10 (D.D.C. 1986), *aff'd*, 857 F.2d 823 (D.C. Cir. 1988).

In addition to the statistical shortcomings of the Havners' epidemiological evidence, another strike against its reliability is that it has never been published or otherwise subjected to peer review, with the exception of Dr. Swan's abstract, which she acknowledges is not the equivalent of a published paper. Dr. Swan has published a number of papers in scientific journals, including a study that concluded Bendectin is not associated with cardiac birth defects. Although she has been testifying in Bendectin limb reduction birth defect cases for many years, Dr. Swan has never attempted to publish her opinions or conclusions about Bendectin and limb reduction defects. Similarly, studies by Dr. Glasser have been published in refereed journals, but none of his 32 to 33 publications mentions Bendectin or limb reduction birth defects.

As already discussed, there are over thirty published, peer-reviewed epidemiological studies on the relationship between Bendectin and birth defects. None of the findings offered by the Havners' five experts in this case have been published, studied, or replicated by the relevant scientific community. As Judge Kozinski has said, "the only review the plaintiffs' experts' work has received has been by judges and juries, and the only place their theories and studies have been published is in the pages of federal and state reporters." *Daubert*, 43 F.3d at 1318 (commenting on the same five witnesses called by the Havners). A related factor that should be considered is whether the study was prepared only for litigation. Has

the study been used or relied upon outside the courtroom? Is the methodology recognized in the scientific community? Has the litigation spawned its own "community" that is not part of the purely scientific community? The opinions to which the Havners' witnesses testified have never been offered outside the confines of a courthouse.

Publication and other peer review is a significant indicia of the reliability of scientific evidence when the expert's testimony is in an area in which peer review or publication would not be uncommon. Publication in reputable, established scientific journals and other forms of peer review "increases the likelihood that substantive flaws in methodology will be detected." *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 593 (1993). One legal commentator has suggested that the ultimate test of the integrity of an expert witness in the scientific arena is "her readiness to publish and be damned." *Daubert*, 43 F.3d at 1318 (quoting PETER W. HUBER, GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM 209 (1991)). Further, "the examination of a scientific study by a cadre of lawyers is not the same as its examination by others trained in the field of science or medicine." *Richardson v. Richardson-Merrell, Inc.*, 857 F.2d 823, 831 n.55 (D.C. Cir. 1988) (quoting *Perry v. United States*, 755 F.2d 888, 892 (11th Cir. 1985)).

We do not hold that publication is a prerequisite for scientific reliability in every case, but courts must be "especially skeptical" of scientific evidence that has not been published or subjected to peer review. *Brock v. Merrell Dow Pharms., Inc.*, 874 F.2d 307, 313 (5th Cir.), *as modified on reh'g*, 884 F.2d 166 (5th Cir. 1989); *see also* Bert

Black et al., *Science and the Law in the Wake of* Daubert: *A New Search for Scientific Knowledge*, 72 TEX. L. REV. 715, 778 (1994). Publication and peer review allow an opportunity for the relevant scientific community to comment on findings and conclusions and to attempt to replicate the reported results using different populations and different study designs.

The need for the replication of results was acknowledged by the Havners' witnesses. Moreover, it must be borne in mind that the discipline of epidemiology studies associations, not "causation" per se. Particularly where, as here, direct experimentation has not been conducted, it is important that any conclusions about causation be reached only after an association is observed in studies among different groups and that the association continues to hold when the effects of other variables are taken into account. *See, e.g.*, MOORE & MCCABE, *supra*, at 202.

As we have already observed, an isolated study finding a statistically significant association between Bendectin and limb reduction defects would not be legally sufficient evidence of causation. The Havners' witnesses conceded that when a number of studies have been done, it would not be good practice to pick out one to support a conclusion. As the federal *Reference Manual on Scientific Evidence* points out, "[m]ost researchers are conservative when it comes to assessing causal relationships, often calling for stronger evidence and more research before a conclusion of causation is drawn." Bailey et al., Reference Guide on Epidemiology, *in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE, *supra*, at 157. For example, Dr. Swan

explained that initially, some studies showed a statistically significant association between Bendectin and the birth defect pyloric stenosis. However, subsequent, much larger studies did not bear out that association, and in fact, Swan herself has published studies that failed to find an association between Bendectin and this type of birth defect.

Accordingly, if scientific methodology is followed, a single study would not be viewed as indicating that it is "more probable than not" that an association exists. *See, e.g., Richardson v. Richardson-Merrell, Inc.*, 649 F. Supp. 799, 802 n.10 (D.D.C. 1986) (noting that no single study would be sufficient to exonerate or to implicate Bendectin with certainty and that studies become "conclusive" only in the aggregate), *aff'd*, 857 F.2d 823 (D.C. Cir. 1988). In affirming the district court in *Richardson*, the District of Columbia Circuit recognized that the plaintiffs' expert had recalculated epidemiological data and had obtained a statistically significant result. *See Richardson*, 857 F.2d at 831. The court nevertheless held this was not evidence that would support a verdict. *Id.* Courts should not embrace inferences that good science would not draw. *But cf. Lynch*, 830 F.2d at 1194 (asserting that a new study coming to a different conclusion and challenging the consensus would be admissible).

The argument is sometimes made that waiting until an association found in one study is confirmed by others will mean that early claimants will be denied a recovery. *See, e.g.*, Green, *supra*, 86 Nw. U.L. Rev. at 680-81; Wendy E. Wagner, *Trans-Science in Torts*, 96 Yale L.J. 428, 428-29 (1986). A related argument is that history tells us that the scientific community has been slow at times to accept

valid research and its results. While these observations are true, history also tells us that valid and reliable research and theories are generally accepted quickly within the scientific community when sufficient explanation is provided and empirical data are adequate. *See* Black et al., *supra*, 72 TEX. L. REV. at 779-82 (discussing Galileo, Pasteur, DNA, and continental drift).

Others have argued that liability should not be allocated only on the basis of reliable proof of fault because legal rules should have the goals of "risk spreading, deterrence, allocating costs to the cheapest cost-avoider, and encouraging socially favored activities," and because " 'consumers of American justice want people compensated.' " Rochelle Cooper Dreyfuss, *Is Science a Special Case? The Admissibility of Scientific Evidence After* Daubert v. Merrell Dow, 73 TEX. L. REV. 1779, 1795-96 (1995) (quoting Kenneth R. Feinberg, *Civil Litigation in the Twentieth-First Century: A Panel Discussion*, 59 BROOK. L. REV. 1199, 1206 (1993)). It has been contended that "[f]or some cases that very well may mean creating a compensatory mechanism even in the absence of clear scientific proof of cause and effect" and that "[d]eferring to scientific judgments about fault only obscures the core policy questions that are addressed by the laws that the court is applying." *Id.* We expressly reject these views. Our legal system requires that claimants prove their cases by a preponderance of the evidence. In keeping with this sound proposition at the heart of our jurisprudence, the law should not be hasty to impose liability when scientifically reliable evidence is unavailable. As Judge Posner has said, "[l]aw lags science; it does not lead it." *Rosen v. Ciba-*

Geigy Corp., 78 F.3d 316, 319 (7th Cir.), *cert. denied*, 117 S. Ct. 73 (1996).

B

The Havners relied on *in vivo* animal studies to support the conclusion that Bendectin causes limb reduction birth defects in humans. This evidence was presented by Dr. Adrian Gross, a veterinarian and a veterinary pathologist who had worked at the FDA from 1964 to 1979, served as the Chief of the Toxicology Branch at the Environmental Protection Agency from 1979 to 1980, and thereafter was a Senior Science Advisor at the EPA. Dr. Gross confirmed that the FDA and EPA consider animal studies in assessing the potential human response to drugs or pesticides. He testified that what will affect an animal is likely to affect humans in the same way and that the only reason animal studies are done is to predict if the drug at issue will have an adverse effect on humans.

Dr. Gross reviewed a number of animal studies that had been conducted on Bendectin. He described studies on rabbits exposed to Bendectin in which he saw "a lot of malformed kits." Gross testified about another study of rabbits that he found statistically significant. He opined that the probability that the malformations in this study occurred by chance were six in 10,000. With respect to another animal study on rabbits, he stated that the probability that the drug was harmless was less than one per 1,000,000. He listed studies on monkeys, rats, and mice showing "highly significant deleterious harmful effects as far as birth defects are concerned." Based on these animal

studies, Dr. Gross was of the opinion that Bendectin was teratogenic in humans, which means that it causes birth defects. However, he conceded that the dosage levels at which Bendectin became associated with birth defects in rats was at 100 milligrams per kilogram per day, which would be the equivalent of a daily dosage of 1200 tablets for a woman weighing 132 pounds.

The Havners assert in their briefing before this Court that the accepted technique for determining if a substance is a teratogen in humans is to look at all information, including epidemiological data, animal data, biological plausibility, and *in vitro* studies. Dr. Swan confirmed that these are the relevant sources of information in determining teratogenicity. *See also* Brent, *Comment on Comments on "Teratogen Update: Bendectin,"* TERATOLOGY 31:429-30 (1985) (stating process for determining if a substance is a teratogen: (1) consistent, reproducible findings in human epidemiological studies; (2) development of an animal model; (3) embryo toxicity that is dose related; and (4) consistency with basic, recognized concepts of embryology and fetal development). Thus, scientific methodology would not rely on animal studies, standing alone, as conclusive evidence that a substance is a teratogen in humans. *See Raynor v. Merrell Pharms., Inc.*, 104 F.3d 1371, 1375 (D.C. Cir. 1997) (noting that the only way to test whether data from nonhuman studies can be extrapolated to humans would be to conduct human experiments or to use epidemiological data); *Elkins v. Richardson-Merrell, Inc.*, 8 F.3d 1068, 1071 (6th Cir. 1993) (holding that expert opinion indicating a basis of support in animal studies is admissible but is simply inadequate to permit a jury to conclude that Bendectin more probably than not causes

limb defects); *Lynch*, 830 F.2d at 1194 (asserting that *in vivo* and *in vitro* animal studies singly or in combination do not have the capability of proving causation in human beings in the absence of any confirming epidemiological data); *see also Brock*, 874 F.2d at 313 (recognizing that animal studies are of very limited usefulness when confronted with questions of toxicity); *Allen v. Pennsylvania Eng'g Corp.*, 102 F.3d 194, 197 (5th Cir. 1996) (quoting and following *Brock* in toxic tort case).

We further note that with respect to the *in vivo* studies about which Dr. Gross testified, their reliability as predictors of the effect of Bendectin in humans is questionable because of the dosage levels. Dr. Gross offered no explanation of how the very high dosages could be extrapolated to humans. Other courts have rejected animal studies that relied on high dosage levels as evidence of causation in humans. *See, e.g., Turpin v. Merrell Dow Pharms., Inc.*, 959 F.2d 1349 (6th Cir. 1992) (reasoning that to eliminate drugs toxic to embryos at high dosage levels would eliminate most drugs and many useful chemicals on which modern society depends heavily) (citing James Wilson, *Current Status of Teratology, in* HANDBOOK OF TERATOLOGY 60 (1977)). Gross also failed to explain why the published studies from which he extracted his data had concluded Bendectin was not harmful.

The *in vivo* studies identified in this case cannot support the jury's verdict.

C

Dr. Stuart Allen Newman also relied on animal studies to support his opinion that Bendectin is a teratogen in humans. Dr. Newman holds a doctorate in chemical physics and is a professor at New York Medical College. He has published over fifty articles, although none contain the opinions or conclusions to which he testified in this case.

The studies Newman reviewed were *in vitro* studies, which are based on tests conducted on cells in a test tube or petri dish. Doxylamine succinate was placed directly on the limb bud cells of animals including chickens and mice. The development of cartilage was affected. Newman acknowledged that in these studies, the researchers who had conducted them concluded only that doxylamine succinate was potentially capable of inducing genetic damage and that it should be tested on other systems. But Newman testified that if you find an effect that prevails across a number of different species, "you can be awfully sure that the same thing will prevail in humans."

Newman opined that Kelly Havner's defect was due to loss of portions of the skeleton that *could* with scientific certainty have been caused by a teratogen that affected the embryo. Similarly, he testified that the findings of one study, the Hassell/Horigan Study, indicated to him that doxylamine succinate can interfere with chondrogenesis, which is the process of certain cells turning into cartilage. We note that testimony to the effect that a substance "could" or "can" cause a disease or disorder is not evidence that in reasonable probability it does. *See, e.g.,*

Parker v. Employers Mut. Liab. Ins. Co., 440 S.W.2d 43, 47 (Tex. 1969); *Bowles v. Bourdon*, 219 S.W.2d 779, 785 (1949). Newman testified, however, that based on the Hassell/Horigan and other animal studies, he concluded with a reasonable degree of medical certainty that doxylamine succinate is a teratogen for cartilage development and that doxylamine succinate is a teratogen in humans. He also testified that he had reviewed the records surrounding Marilyn Havner's pregnancy and that to a reasonable certainty, she was not exposed to any teratogen other than Bendectin.

The *in vitro* studies are similar to the cell biology data at issue in *Allen v. Pennsylvania Engineering*, 102 F.3d at 198. The fact that Bendectin may have an adverse effect on limb bud cells is "the beginning, not the end of the scientific inquiry and proves nothing about causation without other scientific evidence." *Id.*; *see also Richardson*, 857 F.2d at 830 ("Positive results from *in vitro* studies may provide a clue signaling the need for further research, but alone do not provide a satisfactory basis for opining about causation in the human context."); Bailey et al., *Reference Guide on Epidemiology*, *in* REFERENCE MANUAL ON SCIENTIFIC EVIDENDE, *supra*, at 130-31 (noting that the problem with *in vitro* studies is extrapolating the findings "from tissues in laboratories to whole human beings").

Logical support for Dr. Newman's opinions was also lacking. A number of substances, such as vitamin C, have been shown to damage animal cells when placed directly on tissue. Dr. Newman offered no explanation of how he made the logical leap from the *in vitro* studies on animal tissue to his conclusion that Bendectin causes birth

defects in humans. Dr. Newman's testimony is not evidence of causation.

D

Of the five witnesses who testified on the question of causation, the only witness who opined that Bendectin was the cause of Kelly Havner's birth defect, as opposed to birth defects in general, was Dr. John Davis Palmer. Dr. Palmer is a licensed medical doctor and holds a doctorate in pharmacology. He is a professor at the University of Arizona College of Medicine and the acting head of its Pharmacology Department. His opinion was based in part on the testimony of the Havners' other witnesses.

Dr. Palmer testified that there is a critical period during gestation when the limbs of a fetus are forming. Marilyn Havner took Bendectin somewhere between the 32nd and 42nd day of gestation, depending on how the date of conception is calculated, which was within the period for the development of Kelly Havner's hand and arm. Palmer explained that the molecular structure of doxylamine succinate, one of the two components of Bendectin, permits it to cross the placenta from the mother's body and reach the fetus. Based on this fact and on *in vitro* animal studies, intact animal studies, and epidemiological information, he concluded that doxylamine succinate is a teratogen in humans. Relying on this same information and on information concerning Kelly Havner, including the date her mother ingested Bendectin, Dr. Palmer concluded that to a reasonable degree of medical certainty, Bendectin caused the birth defect seen in Kelly Havner's hand.

However, Dr. Palmer's testimony is based on epidemiological studies that conclude just the opposite. To the extent that he relied on the opinions of Drs. Swan, Glasser, Newman, or Gross, there is no scientifically reliable evidence to support their opinions, as we have seen. Palmer identified no other study or body of knowledge that would support his opinion, other than the chemical structure of doxylamine succinate and a study done on antihistamines, not Bendectin. The Sixth Circuit captured the essence of Dr. Palmer's testimony when it said, "no understandable scientific basis is stated. Personal opinion, not science, is testifying here." *Turpin*, 959 F.2d at 1360. That court further observed that Dr. Palmer's conclusions so overstated their predicate that it could not legitimately form the basis for a jury verdict. *Id.* We agree with that observation based on the record in this case.

* * *

There is no scientifically reliable evidence to support the verdict in this case. Accordingly, we reverse the judgment of the court of appeals in part and render judgment for Merrell Dow.

Priscilla R. Owen
Justice

OPINION DELIVERED: July 9, 1997

IN THE SUPREME COURT OF TEXAS

No. 95-1036

MERRELL DOW PHARMACEUTICALS, INC., PETITIONER

v.

ERNEST HAVNER AND MARILYN HAVNER ON BEHALF OF THEIR MINOR CHILD KELLY HAVNER, RESPONDENTS

ON APPLICATION FOR WRIT OF ERROR TO THE COURT OF APPEALS FOR THE THRITEENTH DISTRICT OF TEXAS

Argued on March 19, 1996

JUSTICE SPECTOR, concurring.

The Court today fails to heed its own warning that "the examination of a scientific study by a cadre of lawyers is not the same as its examination by others trained in the field of science or medicine." ___ S.W.2d at ___ (internal citations omitted). I agree that the Havners' expert witness testimony is not legally sufficient evidence of causation. However, as a judge, and not a scientist, I am uncomfortable with the majority's ambitious scientific analysis and its unnecessarily expansive application of the *Daubert* standard. The majority's opinion, replete with

dicta, gives courts no practical guidance outside the context of Bendectin litigation. Accordingly, I concur only in the judgment of the Court.

Rose Spector
Justice

OPINION DELIVERED: July 9, 1997

IN THE SUPREME COURT OF TEXAS

No. 95-1036

MERRELL DOW PHARMACEUTICALS, INC., PETITIONER

v.

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ON APPLICATION FOR WRIT OF ERROR TO THE COURT OF APPEALS FOR THE THRITEENTH DISTRICT OF TEXAS

Argued on March 19, 1996

JUSTICE GONZALEZ, concurring.

I join the Court's opinion and judgment. I write separately to reiterate that the guidelines we established in *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995), are not limited to expert testimony based on a novel scientific theory.

In *Robinson*, we held that Texas Rule of Evidence 702 requires the proponent of scientific expert testimony to show that the testimony is both relevant and reliable. *Robinson*, 923 S.W.2d at 556. In doing so, we followed the lead of the United States Supreme Court and the Texas Court of Criminal Appeals and adopted a list of non-

exclusive factors for determining whether such testimony is admissible.[1] *See id.* at 554-57 (citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *Kelly v. State*, 824 S.W.2d 568 (Tex. Crim. App. 1992)). Here, the Court applies the *Robinson* criteria to Merrell Dow's legal sufficiency challenge and concludes that the Havners' expert testimony is no evidence of causation. ___ S.W.2d ___. I agree with this approach. But I am concerned that some litigants may misread *Robinson* to apply only to novel scientific evidence because of my later writings applying it to "junk science" cases. *See S.V. v. R.V.*, 933 S.W.2d 1, 26 (Tex. 1996) (Gonzalez, J., concurring); *Burroughs Wellcome Co. v. Crye*, 907 S.W.2d 497, 500 (Tex. 1995) (Gonzalez, J., concurring).

Recently, the Court of Criminal Appeals addressed a similar attack on *Kelly*, that court's equivalent of *Robinson*. In rejecting this argument, the court stated:

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[1] These factors are:

(1) the extent to which the theory has been or can be tested;

(2) the extent to which the technique relies upon the subjective interpretation of the expert;

(3) whether the theory has been subjected to peer review and/or publication;

(4) the technique's potential rate of error;

(5) whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and

(6) the non-judicial uses which have been made of that theory or technique.

E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549, 557 (Tex. 1995) (citation and footnote omitted).

> Nowhere in *Kelly* did we limit the two-pronged standard to novel scientific evidence. The [United States] Supreme Court in *Daubert* directly addressed the issue in a footnote, stating "[a]lthough the *Frye* decision itself focused exclusively on 'novel' scientific techniques, we do not read the requirements of Rule 702 to apply specifically or exclusively to unconventional evidence." *Daubert*, 509 U.S. at 593 n.11, 113 S. Ct. at 2796 n.11. The Supreme Court noted that "under the Rules, the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Id.* at 589, 113 S. Ct. at 2795 (emphasis added). We likewise see no value in having a different standard of admissibility for novel scientific evidence. The problems presented in determining whether or not a particular type of evidence would be considered "novel" are daunting enough to reject application of a dual standard. Moreover, we observe that the factors and criteria set forth in *Kelly* as bearing upon the reliability of proffered scientific evidence are adequate measure for assuring that "novel" scientific evidence which is "junk science" is excluded. These factors "address the soundness of the underlying scientific theory and technique." *Jordan v. State*, 928 S.W.2d 550, 554 (Tex. Crim. App. 1996). . . .

Hartman v. State, 1997 WL 195084, at *3, ___ S.W.2d ___, ___ (Tex. Crim. App. Apr. 23, 1997). This analysis applies equally to *Robinson*. As I have said before, we intended *Robinson* to "provide the exclusive standard for evaluating the reliability of expert testimony about anything characterized as science." *S.V. v. R.V.*, 933 S.W.2d at 42 (Gonzalez, J., concurring on rehearing). We did not

intend to free from *Robinson*'s grasp what might be considered routine science.

The Havners attempted to prove causation primarily through expert testimony based on epidemiological and animal studies. These foundations are by no means novel. By applying the *Robinson* factors to Merrell Dow's no-evidence challenge, the Court implicitly holds that *Robinson* applies to scientific expert testimony across the board. The trial court must only determine whether the evidence is relevant and reliable. *See Robinson*, 923 S.W.2d at 556. It need not decide whether the evidence is also novel.

Raul A. Gonzalez
Justice

OPINION DELIVERED: July 9, 1997

APPENDIX B

NO. 95-1036

IN THE SUPREME COURT OF TEXAS

MERRELL DOW PHARMACEUTICALS, INC.,
Petitioner,

vs.

ERNEST and MARILYN HAVNER,
on Behalf of Their Minor Child, KELLY HAVNER,
Respondents.

On Application for Writ of Error to the Court of Appeals for the 13th Supreme Judicial District Corpus Christi, Texas

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RESPONDENTS' MOTION FOR REHEARING

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NO. 95-1036

IN THE SUPREME COURT OF TEXAS

MERRELL DOW PHARMACEUTICALS, INC.,

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vs.

ERNEST and MARILYN HAVNER,
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Respondents.

On Application for Writ of Error to the Court of Appeals for the 13th Supreme Judicial District
Corpus Christi, Texas

RESPONDENTS' MOTION FOR REHEARING

TO THE HONORABLE MEMBERS OF THE SUPREME COURT OF TEXAS:

COME NOW Respondents, Ernest and Marilyn Havner, on behalf of their minor child, Kelly Havner, in the above styled and numbered matter, and pursuant to Rule 190(b), of the Texas Rules of Appellate Procedure, serve and file this Respondents' Motion for Rehearing, which rehearing Petitioners seek to correct certain errors in the original decision by this Court, issued July 9, 1997.[1]

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[1] Respondents attach a copy of the Court's decision as "Exhibit 1." Respondents use the same abbreviations and record reference citation as they did in their response to Merrell Dow's application.

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Rehearing Point of Error No. 1:

The Court erred in reversing and rendering when, given the new developments of law promulgated by the Court's decision, justice requires that the Court remand this case to the trial court for a new trial in order that Respondents (Plaintiffs) may put forth their best case in accordance with the law of the State of Texas 6

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III.

STATEMENT OF THE CASE FOR REHEARING

Outlined against a hazy July sky, the four horsemen rode again last Wednesday, July 9, 1997. You know them: Pestilence, Death, Famine, and this Texas Supreme Court.

Shucking its collective black robe and confidently donning the familiar, white lab coat, its royal blue cursive name artfully inscribed above the pocket, this Court has taken on the world of science. Almost. Instead, its *Havner* decision is no more than a detailed, 58-page, science fiction, filled with skewed observations and prissy platitudes, which reads like a corporate instruction book on the new rules to a childhood game.

This Texas Supreme Court, fervent to follow the law laid out for it by those who would kill and injure for profit, stand stiffly in a row, nine nutty professors, hands clasped tightly together, shoulder to shoulder, chanting with glazed eyes and cultlike precision, "Red rover, red rover, let Kelly Havner come over." Then this Court coldly stares as a beautiful little girl, maimed by the poison of Merrell Dow, runs toward it with the innocence and sparkle of a child, smiling, believing in what her

mom and dad taught her of right and wrong, of love and justice. She also believed somehow, that judges should be her fair shield, her protectors, her chance to know equality when pitted against the open corporate vault of America's companies.[2] So she trustingly approaches this line, this impenetrable line. This Court gleefully bounces her back, tosses her forever out the courthouse window, as it mumbles inanely of "green cheese" on the moon. Just as Merrell Dow's decision to make money at the life-time expense of babies across the country was made long before the first Bendectin pill ever was prescribed, so this Court's decision was made long before it heard of Kelly. This decision succeeds only in showing the caricature that occurs when politics becomes a branch of science.

As Respondents attempted to explain to this Court in their Motion to Recuse Justice Baker (which this Court dismissed as moot), when they notified it that Merrell Dow's lawyer, John Hill, signed off on a campaign letter printed on Justice Baker's campaign stationery (dated seven days after oral argument in Kelly Havner's case and which sought to raise a half-million dollars for Justice Baker[3]): Texas juries are better left to hear evidence on scientific matters, and decide that evidence's weight, than Judges who may be beholden to the lawyers appearing before them.

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[2] Respondents attach a copy of Kelly Havner's own statement, which she wrote for school, after witnessing oral argument in this cause, as "Exhibit 2."

[3] Respondents attach a copy of their Motion to Recuse as "Exhibit 3."

Members of this Court have been quick to point out, in light of the history of courts before it, that the perception long has been that justice is for sale in Texas. John Hill's letter reminded prospective contributors to Justice Baker of the need to continue the reform that this Supreme Court has claimed to champion. However, what is brought home by John Hill's letter, is the continued existence of those undeniably real dangers faced by elected, judicial officials – including this Court – who depend on the financial munificence and political influence of the lawyers appearing in front of them.

It is for this very reason that evidentiary matters ought to be weighed in the jury box, and not in the ballot box. For our civilization decided long ago that Justice is a thing too important to be entrusted to trained men. When the goal is Justice, we are to collect 12 ordinary people standing around. The Founder of Christianity took the same approach.

One day soon, an elected, state district judge, anywhere in Texas, holding the *Havner* decision and trying to comprehend what this Court meant and, more importantly, how to rule on an issue of science, may face the same type of dilemma. Perhaps the attorney arguing before this trial judge will have spearheaded his campaign in order to "continue a program of reform," just as did John Hill in his fund-raising efforts for his friend, Justice Baker. And perhaps the other party before the trial court, like Kelly Havner, will have no such friend, grateful for the favor.

The trial court judge will know one thing for certain as a result of this Court's decision: he has the power to

engage in an entirely subjective and practically non-reviewable decision regarding a scientific expert's testimony. More than that, the trial judge will be staring at past contributors who are asking for a ruling, and who know, too, that the subjectivity now bestowed on the Texas trial courts – which subjectivity is inherent in the *Havner* opinion – will insure any bias or 'fudging' remains unprovable, should it occur.

Judges and legislators alike necessarily face the temptations of money, fame, and power – which include the temptation to disregard justice and sell rights, to violate the liberties of the people. Juries do not. Coming on the heels of a court made famous on television news programs for its reputation as a court up for sale, of a court in need of reform, this Court – more than any other – should realize that its decision promotes a continued sense of fear (on both sides of the docket) that trial courts have unlimited power; here, what is fearful is the subjective ability to pluck any case from the jury box and decide, under *Havner,* to make a decision from the bench.

Unfortunately, the hurdle before future litigants has no objective height. Perhaps because of the particular torch passed to this Court by its more plaintiffs'-oriented predecessor, it has felt the need to carry the flame on a new, yet not so different, path. This reaction is well-recognized throughout history. As Samuel Taylor Coleridge observed, "Every reform, however necessary, will by weak minds be carried to an excess, which will itself need reforming."

It would seem, if this Court is to erase the Sixth Amendment from the United States Constitution, and the

Due Course of Law and Open Courts provisions of Article 1 of the Texas Constitution, it would offer something in their place. Yet this Court offers Kelly Havner no truth. No real truth. Rather, it appears to hope that there are some who would still watch its procession and pretend to marvel at its finery, so it drapes itself in 58 pages of contrived reasoning. This Court struggles mightily to conceal what for some time has been open and known: The Texas Supreme Court has no clothes.

The truth, which Kelly Havner deserved, did not need 58 pages and 16 months to prepare. The truth could have been delivered from this dark-paneled Court on the day of oral argument, by the nine judges whose names history will soon forget. A simple, painful truth: No little girl, or anyone else, will take away corporate money, no matter what – not on our watch. Instead, nodding somberly at each other, as science is heady business, this Texas Supreme Court keeps Justice at bay with a Humpty Dumpty logic, "Evidence means just what we choose it to mean – neither more nor less."

The following pages speak the truth. Kelly Havner tried her case consistently with the only law existing at the time of trial. She adhered to the standard, she met her burden, she followed the rules, and a Nueces County jury, dressed not in black robes but in plain street clothes, listened to both sides and found the truth. Now, this Court changes the rules, long after her case has reached a verdict, after five long years on appeal. And she loses. More astoundingly, this Court decides that Kelly Havner has no right to try her case under these new rules.

If this record is read objectively, considering the state of the law at the time of trial, and if the record is given the weight owed it through a sense that law and the love coming from the law are one and the same, then Kelly Havner's verdict should be affirmed. If Kelly Havner's case creates new law, which did not exist at trial, then her case should be remanded.

If there still exists, even in today's polarized times, some deep-felt belief that this record *and the law under which it was tried* should be closely examined, read word for word, page by page, by those individual Judges who chose to ask the people of this State permission to wear a black robe, not a white lab coat, and who gave a promise, an oath, in exchange for that privilege, then Kelly Havner will know Justice. She should not have to ask for such attention, she was promised it by being lucky enough to be a little girl growing up in this State, protected by its courts. Or, this Court can simply defer to other courts in other cases, pronounce a new rule, declare that five years ago Kelly did not follow the new rule, but, instead, followed the rule as it existed at the time, and then rubber stamp the rights of Kelly Havner and her fellow Texans with what has become this Court's tiresome slogan when asked to protect those injured by the powerful and elite: DENIED. Most likely the order already has been given, and the proclamation is sharp and clear:

> Justice is no longer for sale in Texas, the money has been escrowed, the deed has been signed, the deal has been done.

IV.

POINT OF ERROR FOR REHEARING

REHEARING POINT OF ERROR NO. 1:

The Court erred in reversing and rendering when, given the new developments of law promulgated by the Court's decision, justice requires that the Court remand this case to the trial court for a new trial in order that Respondents (Plaintiffs) may put forth their best case in accordance with the law of the State of Texas.

V.

BRIEF OF THE ARGUMENT

Judges and litigants, defense and plaintiffs' counsel – all may dispute the philosophical underpinnings and wisdom of this Court's decision reversing the jury's verdict in favor of Kelly Havner. But few will be able to take this decision and try, defend, or rule in a case involving scientific evidence. Regardless of its unmanageability in terms of application, however, the Court's decision is now the law. The 8 to 0 opinion issued by the highest court of the State of Texas unequivocally expresses the rule that, in cases of what the Court terms "novel, scientific evidence," the party seeking to admit such evidence faces an extraordinarily high hurdle, to be set by a trial judge. That judge may decide to set it so low as to be easily stepped over, or so high as to require that it be pole-vaulted over. Either way, it is adjusted by virtually unreviewable discretion; moreover, until the trial judge chooses the height and rules on whether the jump is successful, there is no jury trial.

The Court's decision requires from both the offering party's experts and its counsel, as well as those for the opposing party, participation in a guessing game. Perhaps the elusive standards are 'meetable.' Cases involving novel scientific evidence will continue as viable and, more importantly, 'triable' solely at the discretion of an elected official who brings to the equation all the follies of his or her bench.

What clearly is *not* 'meetable,' and not 'triable,' of course, is a standard that does not exist at the time that a party offers its evidence but is applied retroactively, any way. Such an application results in injustice.

Kelly Havner came before the trial court with a case consisting of, among other things, the support of experts who the United States Supreme Court expressly has recognized as eminently qualified. She put forth the evidence necessary, *given the standard of law in existence at the time of trial.*

Disregarding the careful and thorough preparation of a serious case involving chemical deformation of a little girl, and disregarding the presentation of qualified experts on the complex issue of causation – for this is *not* a case in which anyone has testified that the moon is made of green cheese – the court's decision punishes Kelly Havner by denying her a chance to try her case under the Court's new standard. This result does not square with the law of Texas, as recognized by members of this court on numerous occasions. Nor does this result do honor to Justice.

All that Respondents seek on rehearing is to have this court acknowledge the inherent fairness in allowing

Kelly Havner's case to return to the trial court and be tried under the new rules. Respondents ask the Court to allow them, once again, to take up Petitioners' challenge and fight on an even field – each party subject to the benefits and costs of the standard of sufficiency that, at least for now, applies.

Petitioners contend this case amounts to claims based on 'junk science.' The Court appears to agree. If so, if Petitioners are right, then, in light of the extraordinary standard now in effect in such cases, Petitioners will win. Respondents believe, however, that *they* will win, again, because, had the standard at issue here existed at the time of suit, Respondents would have adduced precisely the evidence the Court currently contends does not exist in the record. Regardless of whether Respondents win or lose on remand, however, the idea that this Supreme Court would change the law and then deny Kelly Havner the opportunity to retry her case, under the new law, should cause every member of this Court to tremble.

A. The Court's Decision Does Not Explain Old Law, It Creates New Law.

1. The Original Standard for Legal Sufficiency of Expert Scientific Evidence (*Duff v. Yelin*).

In 1988, the Court held that the standard of legal sufficiency applicable to cases predicated upon scientific evidence was as follows:

> [T]he plaintiff must prove, by competent testimony, that the defendant's negligence proximately caused the plaintiff's injury. [. . .] Additionally, and of great importance in this

> case, the plaintiff must establish a causal connection beyond the point of conjecture; proof of mere possibilities will not support the submission of an issue to the jury. [. . .] Although this court has held that it is not absolutely necessary that an expert couch his opinions in terms of a "reasonable medical probability," we still embrace the principle that a jury issue should not be submitted when it is based merely upon speculation and conjecture. [. . .]

Duff v. Yelin, 751 S.W.2d 175, 176 (Tex. 1988) (citations omitted).

Kelly Havner tried her case, beginning in 1992. At this time, the standard of *Duff v. Yelin* applied. Kelly Havner met this standard by not only offering expert testimony (which is the only evidence the Court's decision addresses), but also by adducing concessions and admissions by Merrell Dow's experts, as well as by admissions made in studies upon which Merrell Dow relied in whole or in part, which this Court ignored in its entirety.

For evidence legally sufficient under *Duff v. Yelin*, as provided by Respondents' experts, Respondents refer the Court to their response to Merrell Dow's application ("Response") for record citations in support of the following evidence regarding what constitutes the proper, reliable, scientific method:

(i) a proper, scientific methodology to determine whether a substance is a teratogen considers all data, including *in vitro* studies, animal studies, published data, raw data, unpublished data, chemical structure analysis, and epidemiological work (Response at 31);

(ii) proper methodology *does not* rely on epidemiology alone, much less on Merrell Dow's epidemiological conclusions alone (Response at 31-32);

(iii) animal studies are part of the methodology used in determining teratogenicity (Response at 32-33);

(iv) *in vitro* studies are part of the methodology used in determining teratogenicity (Response at 33);

(v) drug experience reports are part of the methodology and principles in determining teratogenicity (Response at 33).

Indeed, each of Kelly Havner's experts testified that their theory or technique or methodology was "generally accepted" within their field of expertise and that they applied it as such. (*See, e.g.*, Dr. Gross – S.F. XIV, p. 216; Dr. Newman – S.F. XV, pp. 443, 488-89; Dr. Palmer, S.F. XVI, pp. 625-26 & 647.)

Regarding the legal sufficiency of this reliable, scientific evidence, Respondents refer the Court to the following record citations; should no other part of this motion be read or considered, the following eight points are branded forever on the hide of this record – *read this:*

(i) The form of Bendectin at issue here consists of only two components: Doxylamine succinate and the vitamin B-6 (NB: Merrell Dow does not contest this fact.);

(ii) Doxylamine succinate is an antihistamine that crosses the placental barrier in both

animal and human fetuses (S.F. XVI, pp. 637-38);

(iii) Bendectin crosses the placental barrier in both animal and human fetuses (*id.*);

(iv) The accumulation of doxylamine succinate and Bendectin in both animal and human fetuses causes limb defects – they are teratogens (S.F. XVI, pp. 637-38 (animals), S.F. XIV, p. 279 (animals), S.F. XIV, pp. 291-92 (animals), S.F. XIV, pp. 299-300 (animals and humans), S.F. XV, p. 498 (humans), and S.F. XVI, pp. 672-73 (humans);

(v) During the time period of fetal limb development, Kelly Havner's mother ingested Bendectin (S.F. XV, pp. 535-36);

(vi) Kelly Havner's mother consumed no other teratogen during this time period other than Bendectin (S.F. XV, p. 554);

(vii) Kelly Havner's limb defect is not of genetic origin and is consistent with teratogenic defects (S.F. XIII, pp. 107-08, 113 & S.F. SV XV, p. 537); and

(viii) Kelly Havner's mother's consumption of the teratogen Bendectin during this critical time period of fetal development caused the limb defect Kelly Havner bears today (S.F. XVI, pp. 675-77 & S.F. XV, pp. 526-27, 535-36, and 554).

Regarding legally sufficient evidence from Merrell Dow's own experts, Respondents direct the Court to Drs. Friedman's and Lamm's testimony, both of which meet *Duff v. Yelin* (as well as the Court's decision here, which

chooses for some reason to ignore their testimony). Dr. Friedman, again, Merrell Dow's expert, testified that the "Shiono article," which addresses Bendectin and limb defects, *reflects a more than doubling of limb defect frequency.* (S.F. XXI, p. 1690). Dr. Lamm, again, also Merrell Dow's expert, acknowledged in reviewing the *Jick* data, that if the confounding factor of spermicide is removed, there is a statistically significant finding for Bendectin in limb defects. (S.F. XVIII, p. 120-23).[4]

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[4] The Court dismisses the Jick study cursorily, commenting that the Havner's expert, Dr. Glasser, "[D]id, however, reanalyze *some data,* called the Jick data, that had been included in a report to the FDA. Glasser isolated information on women who had filled two or more prescriptions of Bendectin and who were not exposed to spermicide, which resulted in a relative risk of 13.0 of limb reduction [. . . .]" (Opinion at 40 (emphasis added).) It is not at all clear why a study favorable to Kelly Havner is referred to as "some data," as if it were an inconsequential aside in the scientific spectrum. Regardless, the Court chooses to ignore Dr. Glasser's testimony because there was no evidence regarding the confidence interval applicable to this study. (*Id.*) The Court fails to address, however, the significance of Dr. Lamm's testimony (Dr. Lamm being Merrell Dow's expert), which confirmed Dr. Glasser's conclusion as "very statistically significant" *and* specifically contradicted Justice Owen's insistence on the necessity of adopting a 95% confidence level (S.F. XVIII at 1134). Perhaps the Court confused the standard of considering only the evidence favorable to a successful party's position (Opinion at 9) with its own standard of considering only a plaintiff's evidence, and then only in the light least favorable to the plaintiff.

2. **Expert, Scientific Evidence Law Post-*Robinson* and Pre-*Havner*: The Standard of Review as to Admissibility.**

The Court decided, in 1995, three years after Kelly Havner's verdict, to address for the first time whether its 1983 promulgation of Rule 703 of the Texas Rules of Civil Evidence reflected a change in the standard of admissibility of expert testimony. *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995). The Court concluded that rule 703, in fact, did change the standard of admissibility, enumerating its famous list of factors to consider. *Id.* at 557. The court further explicitly stated that *Robinson* did not address the standard of legal sufficiency and that *Duff v. Yelin*, 751 S.W.2d at 175, continued to control on this issue. *Robinson*, 923 S.W.2d at 554.

The Court of Appeals considered Kelly Havner's case under the *Duff v. Yelin* standard, as *Robinson* mandates. *See Merrell Dow Pharmaceuticals, Inc. v. Havner*, 907 S.W.2d 535, 541 (Tex. App. – Corpus Christi 1995) (op. on reh'g). The Court docketed the appeal pre-*Robinson* (1992) and issued its opinion on rehearing post-*Robinson* (August 1995) – during both time periods, this Court assured trial lawyers in Texas that *Duff v. Yelin* controlled. The Corpus Christi court nevertheless considered the *Robinson* factors, which it noted applied to admissibility issues but, nonetheless, were relevant to its analysis. *Havner*, 907 S.W.2d at 549-57. Likewise, the Corpus Christi court also considered *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), which decision the U.S. Supreme Court issued during the intermediate appeal pendency of Kelly Havner's case. *Havner*, 907 S.W.2d at 550 (op. on

reh'g). Stated succinctly, at no point did this court suggest that a different standard applied. To the contrary, it assured everyone that *Duff v. Yelin* still applied.

3. The Law in Light of the Court's Decision in *Havner: The New Standard of Review as to Legal Sufficiency.*

In 1997, barely two weeks ago, nine years after Kelly Havner first brought suit against Merrell Dow, five years after she tried her case to a jury, five years after Merrell Dow began this appeal, this Court for the first time held that a standard other than that described in *Duff v. Yelin* applied and that it had to reverse and *render* Kelly Havner's verdict because she failed to meet this new standard. In particular, in its July 9, 1997 decision, the Court held:

(i) The trial court must "independently evaluate[ ]" an expert's "underlying data" in "determining if the [expert's] opinion itself is reliable." (Op. at 12);

(ii) The *Robinson* factors are relevant to a no evidence review of scientific evidence. (Op. at 15);

(iii) "In the absence of direct, scientifically reliable proof of causation, claimants may attempt to demonstrate that exposure to the substance at issue [creates] an inference that because the risk is demonstrably greater in the population due to exposure to the substance, the claimant's injury was more likely than not caused by that substance." (Op. at 17);

(iv) Prior to "properly designed and executed epidemiological studies" being deemed "legally sufficient," the party offering such studies as evidence must demonstrate a "doubling of the risk." (Op. at 23);

(v) Even upon a showing of such a doubling, "[O]ther factors must be considered." In particular, the trial court must consider the "design and execution of epidemiological stud[ies]," whether "bias" has affected the study's scientific reliability, and what the "relative risk factor" is (the Court does not conclude that a relative risk factor of 3 is required – it impliedly rejects, however, a risk factor of 2). (Op. at 25-27);

(vi) "To raise a fact issue on causation and thus to survive legal sufficiency review, a claimant must do more than simply introduce into evidence epidemiological studies that show a substantially elevated risk. *A claimant must show that he or she is similar to those in the studies. This would include proof that the injured person was exposed to the same substance, that the exposure or dose levels were comparable to or greater than those in the studies, that the exposure occurred before the onset of injury, and that the timing of the onset of injury was consistent with that experienced by those in the study.*" (Op. at 29 (emphasis added));

(vii) "[I]f there are other plausible causes of the injury or condition that could be negated, the plaintiff must offer evidence excluding those causes with reasonable certainty." (Op. at 30); and

> (viii) A confidence level of not less than 95% as to any scientific study upon which the expert predicates his conclusions. (Op. at 37).

This is entirely new law for Texas, both in terms of procedure (a trial court reanalyzing scientific study's underlying data) and substance (determining weight to attach to a testifying expert's foundation analysis). As this Court concludes:

> In sum, we emphasize that courts must make a determination of reliability from all the evidence. Courts should allow a party, plaintiff or defendant, to present the best available evidence, assuming it passes muster under *Robinson*, and only then should a court determine from a totality of the evidence, considering all factors, affecting the reliability of particular studies, whether there is legally sufficient evidence to support a judgment.

(Op. at 30.)

B. When This Court Creates New Law, Historically, the Court Remands for a New Trial in the Interest of Justice

Changing the law is well-within an elected court's prerogative. Brazenly denying a litigant justice, however, is not. For this very reason, at least until now, the Court itself has promulgated – and enforced – Rule 180 of the Texas Rules of Appellate Procedure. Rule 180 provides:

> In each cause, the Supreme Court shall either affirm the judgment of the court of appeals, or reverse and render such judgment as the court

> of appeals should have rendered, or remand the cause to the court of appeals, or reverse the judgment and remand the cause to the trial court, *if it shall appear that the justice of the cause demands another trial.*

T.R.A.P. 180 (emphasis added).

Rule 180 is not some arcane, appellate practice loophole, occasionally invoked by desperate litigants. It is what this Court has recognized as the linchpin of the judicial process – the Court sits to do justice. *Murray v. San Jacinto Agency, Inc.*, 800 S.W.2d 826 (Tex. 1991). In *Murray*, this Court modified its holding in *Arnold v. National County Mut. Fire Ins. Co.*, 725 S.W.2d 165, 168 (Tex. 1987). *Murray*, 800 S.W.2d at 827, 830. Writing for the Court, Justice Gonzalez observed, "It is reasonable to assume that Murray, relying on *Arnold*, concluded that her cause of action accrued on the date SJA admitted its denial was unwarranted. . . . Our decision today, however, modifies *Arnold* so that limitations on Murray's good faith claim commenced on the day SJA denied coverage. . . . Since we have modified the law, we will remand this case in the interest of justice to the trial court."[5] 800 S.W.2d at 830; *see also Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 433 (Tex. 1984) (op. on reh'g) (remanding because "the new theory or rule required new and different evidence"), and *L.M.B. Corp. v. Gurecky*,

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[5] Though Justice Gonzalez wrote a separate concurrence with the Court's decision here, he made no whisper to Kelly Havner of justice and her rights, even though when she was a fetus – human beings about whom Justice Gonzalez has expressed concern in the past with great eloquence – Merrell Dow shaped her hand, and not God.

501 S.W.2d 300, 303 (Tex. 1973) ("these changes in the trial practice justify this court's remand of this cause . . . in the interest of justice").

In *Saenz v. Fidelity & Guaranty Insurance Underwriters*, 925 S.W.2d 607 (Tex. 1996), Chief Justice Phillips likewise wrote, "Where it appears from the record that the losing party may be able to recover under some alternative factual or legal theory not pursued at the first trial, we have frequently remanded in the interest of justice." *Id.* at 616 (dissenting); *see also Casso v. Brand*, 776 S.W.2d 551, 565-66 (Tex. 1989) (Phillips, C.J.) (Justice Phillips providing majority opinion and then, given that the case overruled existing law and created new law, dissenting on court's failure to remand under Rule 180), and *Brown v. RepublicBank First Nat'l Midland*, 766 S.W.2d 203, 208 (Tex. 1988) (Phillips, C.J., dissenting) ("Because this duty to mitigate represents a change in the law, the Bank had no reason at trial to rebut Brown's evidence regarding mitigation. I would therefore reverse the judgment of the court of appeals and, in the interest of justice, remand the cause to the trial court for new trial.").

Indeed, this Court has remanded – rather than rendered – to allow a plaintiff an opportunity to prove a material fact when it decided on appeal that the evidence the plaintiff offered at trial was not appropriate. *Texas Real Estate Comm'n v. Nagle*, 767 S.W.2d 691, 695 (Tex. 1989) (op on reh'g). The Court even has remanded to allow a defendant an opportunity to show that jurisdiction under a foreign judgment was lacking, after the Court held that the plaintiff may have misunderstood the effect of a trial stipulation. *Members Mut. Ins. Co. v. Tapp*, 469 S.W.2d 792, 793 (Tex. 1971). *See also: Porras v. Craig*,

675 S.W.2d 503, 506 (Tex. 1984) (remand to allow plaintiff opportunity to pursue alternative theory of damages); *Continental Southern Lines, Inc. v. Hilland*, 528 S.W.2d 828, 830-31 (Tex. 1975) (remand to allow plaintiff opportunity to pursue alternative legal theory); *Continental Casualty Co. v. Cook*, 515 S.W.2d 261, 263 (Tex. 1974) (per curiam) (remand to allow plaintiff an opportunity to pursue an alternative theory of good cause for failing to timely file his workers' compensation claim); *Houston Fire & Casualty Co. v. Nichols*, 435 S.W.2d 140, 143 (Tex. 1968) (remand to allow insured an opportunity to prove the value of destroyed property after the Court held that the policy amount did not constitute an agreement as to value); *C. & R. Transport, Inc. v. Campbell*, 406 S.W.2d 191, 195-96 (Tex. 1966) (remand because jury may have misunderstood trial court's charge); *Scott v. Liebman*, 404 S.W.2d 288, 294 (Tex. 1966) (holding that remand is proper "when this Court changes the rules after the case has been tried"); *AEtna Ins. Co. v. Klein*, 325 S.W.2d 376 (Tex. 1959) (remand to allow plaintiff an opportunity to put on evidence of the policy amount in an action against his insurer even though plaintiff had not offered this evidence at first trial); and *City of San Antonio v. Pigeonhole Parking of Tex.*, 311 S.W.2d 218, 223 (Tex. 1958) (remand to allow plaintiff an opportunity to prove that ordinance was unconstitutional as applied after the Court held that the ordinance was not facially unconstitutional).

Stated flatly, this Court's decision creates new law. Kelly Havner had no way of shaping her case around, much less putting forth evidence under, a law conceived five years after her verdict. Justice requires that the Court remand this cause for a new trial, otherwise this remains

a vagrant result, an opinion with no visible means of support.

C. A New Trial Here Serves the Interests of Justice Because, Had Respondents Known What the Law Was Going to Be, They Could Have Adduced Such Evidence.

Had Kelly Havner known of the stringent requirements that the Court now imposes for cases involving scientific evidence, had she known that the Court's clear statement in *Robinson* that *Duff v. Yelin* was still the law was, in fact, not true, Kelly Havner would have put on a different case. For Kelly Havner has the evidence necessary to meet this Court's new requirements. For example, Respondents could have asked Dr. Glasser, regarding the Jick data, about the confidence level and whether it contained 1.0. Respondents could have asked Dr. Swan what confidence level she used in obtaining the relative risk of 13 regarding the unpublished study of the Jick data. They could have asked here, further, what significance level was used to obtain the 2.8 relative risk result of her analysis of the Codero study published in the *Journal of Society of Epidemiological Research* (another study the Court chooses to ignore).

Respondents also could have supported their claim of doubling – had they known five years down the road, it would carry the day and be the standard – with Merrell Dow's own admission from the 1982 *Physician's Desk Reference*, which provides:

> The design of the cohort studies was generally adequate to have detected a small increase (less

> than a doubling) in the overall malformation rate, if it existed, but was *not sufficient to rule out a doubling* of a specific malformation type, for example, one per one thousand or two per one thousand.

Likewise, if granted a new trial, Respondents will put on evidence that the much-vaunted, "30 studies" upon which Merrell Dow has relied all these years – those touted, peer-reviewed studies – in fact were the product of biased, "scientific" study. This is the same evidence as that presented in *Blum v. Merrell Dow Pharmaceuticals, Inc.*, Cause No. 1027 (Philadelphia Court of Common Pleas Dec. 13, 1996) (*"Blum"*).[6]

In *Blum*, another successful Bendectin case, the plaintiffs brought to the attention of the court and jury evidence of how Merrell Dow has corrupted the very peer-review process it has demanded as a predicate for admissibility, all these years. For example, among the 30 studies, is the work of Dr. Smithells. After *British Medical Journal*, *Lancet*, and the *New England Medical Journal* each rejected Dr. Smithells' study, *Teratology* accepted it; Dr. Brent, one of Merrell Dow's testifying experts, owns *Teratology*. Dr. Smithell wrote Dr. Brent, telling him:

> [M]uch clearly depends on the value of this publication to Merrell Dow National Labs. If it may save the company large sums of money, large sums in the California court (which is rather what I thought when we undertook this study), they may feel magnaminous. If with the

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[6] Respondents attach a copy of *Blum* as "Exhibit 4."

> passage of time, the study is of no great significance, I can only regard the figure you suggest as generous and welcome.

(Exhibit 5 at 32-33.) Respondents will put forth the evidence that a Dr. Roll, in Germany, writing for the German Official Health Agency, published in the German literature, his conclusion that, "Doxylamine has proven itself in the present case to be teratogenic in Wistar rats bred by the Federal Health Agency." (*Id.* at 33.) Dr. Newburne, a Merrell Dow Vice-President, upon hearing of these findings, hired a Professor Tuchman-Duplessis as a consultant to 'liase' with Dr. Roll. Shortly thereafter, Dr. Roll completed a second study, which did not use Wistar rats, did not examine skeletons, but did use rats whose natural incidence of diaphragmatic hernia was so high that it masked any increased defects by Bendectin. This second study, of course, failed to confirm the first study. (*Id.* at 33-34.)

Regarding the study of Dr. Hendrickx, a peer-reviewed, published researcher at the University of California at Davis, Respondents will demonstrate how, after his study found a statistically significant increase in heart defects in Bendectin-treated monkeys, he wrote Dr. Newburne offering to sell his services: "I also indicated that we would be willing to discuss or modify any part of the proposal with you in order to meet a common objective." Thereafter, Merrell Dow funded Dr. Hendrickx' work in excess of $300,000.00. Dr. Hendrickx' second study, like that of Dr. Roll's, failed to confirm his first. (*Id.* at 35.)

This is a just a sampling of the scientific scholars upon whose work Merrell Dow relies. Indeed, Dr. Brent,

upon whom both Merrell Dow and this Court rely, submits drafts of his articles to Merrell Dow attorneys for their suggestions and their blessings – prior to sending them to the *New England Journal of Medicine*. Merrell Dow's attorneys even told Dr. Brent, in one instance at least, what information to include to counter Mr. Barry Nace's arguments at trial, Mr. Nace being one of the two attorneys who argued this case before the Court. In short, Merrell Dow intentionally and fraudulently poisoned these touted, peer-reviewed studies and then held them up to this Court as evidence that they did not poison Kelly Havner. This Court's new standard should allow, at the very least, for this evidence to be heard.

Given that the Court now requires the trial court to consider the underyling data of an expert's opinions, with a particular eye towards issues of bias, the type of evidence described above is critical. Prior to the Court's decision, it was useful but not necessary.

VI.

PRAYER FOR RELIEF

To Kelly Havner, the most painful irony is the loss of justice for all those who, in the future, hurt by the politically powerful, will be turned away from the courtrooms of Texas by defendants and judges brandishing an opinion that undeservedly carries her name. In an attempt to find a conduit for its "reform," this Court takes the magic of a blue-eyed, soft-spoken, very smart young woman, Kelly Havner, and forever condemns her to be the title of an opinion that symbolizes all that has withered in the legal profession of Texas. What should always be an

earnest search for truth and love by lawyers who ask twelve ordinary people to bring their common sense and reasoning to the process, has now been redesigned by this Court. Its opinion creates neither respect nor deference, from either side of the bar; rather, it confirms a clear and resigned sense of the futility in which this new day dawns.

Respectfully submitted,

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By: /s/ Robert C. Hilliard

ATTORNEYS FOR RESPONDENTS,
ERNEST and MARILYN HAVNER,
on Behalf of Their
Minor Child, KELLY HAVNER

X.

CERTIFICATE OF SERVICE

Pursuant to Rule 190, Texas Rules of Appellate Procedure, I certify that I served a true and correct copy of this document by regular mail, on all counsel of record, as identified below, along with a copy of trial court's final judgment[7], on this the 24th day of July, 1997.

/s/ Robert C. Hilliard

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[7] Respondents attach a copy of the trial court's judgment as "Exhibit 5."

WOOLSEY &
SCHMIDT, L.L.P.
W.N. Woolsey
500 North Water Street
Corpus Christi, Texas 78471

Ernest Havner
2342½ Park Place Drive
503
Liberty, Texas 77575

Marilyn and Kelly Havner
2400 Parker Circle, B
Georgetown, Texas 78628

Merrell Dow v Havner

"Are you ready?" asked my lawyer as we walked out of the Four Seasons to the Texas Supreme Court. After nine years of waiting, hoping, and wondering, we were going to the Texas Supreme Court. When I was five, my parents had started the process of a lawsuit against Merrell Dow Pharmaceuticals for producing the drug Bendectin, which supposedly stopped the growth of my right hand. No one had expected that my case would get as far as the Supreme Court, so we weren't expecting to win.

I was only eight in 1991 when the trial began, so I don't remember much. It had been a long trial, but not even close to the O.J. Simpson case. The jury awarded me over thirty million dollars. We had two lawyers, named Barry Nace and Bob Hilliard. They were complete contrasts. Barry was big in built, with thinning gray hair, while Bob was tall and young. Barry believed that scientific facts were the way to win. Bob believed that you must, "Speak from the heart." Barry was nervous, like a caged tiger waiting to make his next move. Bob was laid back and calm. Despite their differences, put together they were hard to beat (I can say this, because we won our trial).

Bob had asked us to go to the Texas Supreme Court so the judges could see me in person and not just a name on a legal document; however, my mother and I had plans to go anyway. We were the first argument of the day and had to be there early so our lawyers gave us a room at the Four Seasons Hotel. The night before the trial, we had dinner with the lawyers. I realized then that my case was very important. Merrell Dow v Havner was only the second environmental case to reach the Texas Supreme Court. The first case's verdict had been highly debated, so mine will frequently be quoted.

On March 19, 1996, at 7:30 a.m., we walked into the Supreme Court building. Barry, by then a nervous wreck, went straight to the law library to study. The people from Court T.V. were there with cameras. Upon learning this, I ran into the bathroom in a panic about my hair and stayed there for the next thirty minutes. At 8:15 the courtroom was opened. I sat in the front row beside my dad and in front of my mother and cousin. The courtroom had pink marble with a long oak table at the front of the room. This was where the nine Supreme Court Justices would sit. Their seats were black leather swivel chairs. I thought the chairs were unusual because I always imagined a big, dark wooden chair for a judge. I was not nervous, but I hoped that everything would go well. When I looked at my father, I noticed that he was on the verge of tears. My thoughts weren't on the trial as much as trying to absorb everything at once. The courtroom was soon packed, and the assistants had to bring out extra chairs. Each side would have twenty-five minutes to present their case. The judges came in, and so began "Round 1."

Merrell Dow went first. They could split up their time before and after my lawyers spoke. Their lawyer was a man I had never seen before, named Hill. I later found out that he was once a judge. He was not at the original trial and knew little about the case. Only three different judges asked questions. The room was tense and uptight. This atmosphere was created by Mr. Hill's way of debating. The minute Bob got up there, the room was relaxed, and more judges asked questions. This put him on the defensive, which I knew was not what he wanted. Barry talked the last ten minutes of our twenty-five. Despite his nervousness, he kept the room relaxed. He seemed to be a father lecturing his son that might have been mistaken. He was not exactly saying the judges questions were wrong, but he showed them he was right with patience. Barry was amazingly convincing when he talked about teratology and epidemiology.

There were only two women on the Court. The Court was relatively young, with only two totally grey-haired men. One of the women was fierce in asking her questions. Ironically, next to her was a judge in a wheelchair who appeared nice when he asked his questions. He was the only one who looked our way.

Afterwards all of our lawyers seemed optimistic, but the most optimistic of all was strangely enough, Barry. He said that even if we got a retrial it should be considered a victory. We do not know what the verdict will be. I only hope that the right thing is done, and justice will prevail.

/s/ Kelly Havner

NO. 95-1036

IN THE SUPREME COURT OF TEXAS

MERRELL DOW PHARMACEUTICALS, INC.,

Petitioner,

V.

ERNEST HAVNER & MARILYN HAVNER
ON BEHALF OF THEIR MINOR CHILD
KELLY HAVNER,

Respondents,

RESPONDENTS' MOTION TO RECUSE JUSTICE JAMES A. BAKER

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ATTORNEYS FOR RESPONDENTS ERNEST HAVNER AND MARILYN HAVNER ON BEHALF OF THEIR MINOR CHILD, KELLY HAVNER

NO. 95-1036

IN THE SUPREME COURT OF TEXAS

MERRELL DOW PHARMACEUTICALS, INC.,

Petitioner,

V.

ERNEST HAVNER & MARILYN HAVNER ON BEHALF OF THEIR MINOR CHILD KELLY HAVNER,

Respondents,

Appealed from the Thirteenth Court of Appeals
At Corpus Christi, Texas

RESPONDENTS' MOTION TO RECUSE JUSTICE JAMES A. BAKER

TO THE SUPREME COURT OF TEXAS:

Respondents Ernest Havner and Marilyn Havner, on behalf of their minor child Kelly Havner, under the authority of the United States and Texas Constitutions, Tex.R.Civ.P. 18b, Tex.R.App.P. 15 and 15a, file this motion to recuse Justice James A. Baker from this cause.

1. Respondents ask that Justice Baker be recused from further participating in or voting on this case for the following reasons. On March 26, 1996, only seven days

after oral argument and prior to this Court issuing its opinion, Justice Baker's campaign mailed-out a funds solicitation letter to lawyers across the State. The letter identified Justice Baker's race as being the "toughest – and the most critical" of all the Republicans running for the Supreme Court. Merrell Dow's lawyer, John Hill, fresh from arguing Merrell's case to this Court, signed Justice Baker's request for money. A copy of the letter (redacted as to recipient) is attached as Exhibit 1. The objective facts in support of this motion are that John Hill stood at the podium before Justice Baker, and the rest of this Honorable Court, and firmly insisted on a reversal of the 13th Court of Appeal's affirmation of Kelly Havner's verdict. Within a week, Mr. Hill signed his name to a letter sent to Texas lawyers seeking to collect money to be used to ensure Justice Baker continues to sit on this Court. John Hill's letter, mailed out on Justice Baker's campaign stationery, causes Justice Baker's impartiality to be reasonably questioned in this proceeding. Consequently, under the clear reading of the rules, Justice Baker "shall disqualify or recuse himself." Tex.R.App.P. 15a and Tex.R.Civ.P.18b(2)(a).

2. Kelly Havner now faces an uncomfortable dilemma, one she should never have had to worry about: basic fairness. She now must ask this Court to spend time evaluating the effects of political conduct as it may relate to her case. She makes this request with much caution and deference. It simply cannot be ignored and there is little question that John Hill's letter puts Justice Baker's impartiality in issue. First, obviously Mr. Hill wants Justice Baker to vote in Merrell's favor in this case as it will save his client approximately Eight Million Dollars

($8,000,000.00). Second, and just as obviously, Justice Baker wants to be re-elected and needs money to assist in his endeavor. John Hill is publicly spear-heading Justice Baker's efforts to build a war chest. Mr. Hill, the former Chief Justice of this Court, is using his name in hopes of peddling influence on behalf of Justice Baker. Justice Baker is relying on Mr. Hill to convince lawyers from around the state to "Send Justice James A. Baker your contribution *today*." This is completely different than when Justice Baker's campaign accepted $5,000.00 on December 27, 1995 from Liddell, Sapp, Zivley, Hill & LaBoon's (Mr. Hill is a named partner in Liddell, Sapp, Zivley, Hill & LaBoon) PAC, or when a single lawyer sends a campaign contribution to his Supreme Court candidate of choice. The focus of this motion is a highly organized fund raising effort which must depend and rely on John Hill's permitting the use of his name to insure large sums of contribution money will go to Justice Baker.

3. Justice Baker may not allow John Hill's leverage to sway him in any way. In fact, Respondent's true hope and belief is that Justice Baker, should he remain on this case, would vote fairly and in a way consistent with his own independent sense of learning and experience. However, this is not the issue. The issue is whether Justice Baker's impartiality is now reasonably in question in this proceeding as a result of his campaign's choice in selecting Merrell's attorney, the lawyer of a pending case, to author a written solicitation for money; money which will go directly to Justice Baker's re-election efforts. Justice Baker is currently considering a case that John Hill argued for Merrell; a case which will save Mr. Hill's

clients millions of dollars should Justice Baker and a majority of this Court follow Mr. Hill's direction. A case that will be tremendously significant in all future litigation involving experts. There can be no serious debate that does not lead to the reasoned conclusion that Justice Baker must recuse himself from voting or participating any further in this matter.

4. Merrell Dow's position as presented by John Hill in this case is that a Judge rather than a jury should decide the weight and credibility of expert testimony. This Court now has an example of the dangers created when elected officials, who have to depend on the financial kindness and political influence of the lawyers who appear in front of them, begin to weigh matters meant to be decided in the jury box. One day, an elected State District Judge, facing the same dilemma as Justice Baker, may have to make a subjective decision regarding an expert. Perhaps the lawyer asking the Judge to rule the expert's testimony inadmissible will have also spearheaded that Judge's fund collecting efforts. Judges and Legislators are necessarily exposed to temptations of money, fame, and power to induce them to disregard justice and sell the rights, and violate the liberties of the people. Jurors, on the other hand, are exposed to none of these temptations. A jury, therefore, ensures the first and indispensable requisite in a judicial tribunal, integrity. A level judicial playing field for both sides is fundamental to the notion of non-partisan fairness. Should Justice Baker remain a sitting member of the Court deciding this case, it does damage to the respected reputation of the man himself, to the Court and to the process of Justice.

5. Respondents' counsel, Robert C. Hilliard, first learned of the mail-out on April 8, 1996. This motion was immediately prepared and mailed to this Honorable Court on April 9, 1996. Respondents make this objection at the first opportunity; therefore, good cause exists under Tex.R.App.P. 15(a) and the Court should permit this objection and motion to be filed.

6. For these reasons, Respondents Ernest Havner and Marilyn Havner, on behalf of their minor child Kelly Havner ask that Justice James A. Baker recuse himself from this case. If Justice Baker refuses, Respondents request that the motion be referred to the Court en banc, without Justice Baker, for a ruling.

> *"Justice Baker is also an integral member of the Court's continued movement for reform. He is committed to fully and permanently restoring the integrity of the Court . . . "*
>
> *John L. Hill, Jr.*
>
> *Campaign to*
>
> *Elect Justice James A. Baker*
>
> *For Texas Supreme Court*
>
> *March 26, 1996*

Respectfully Submitted,

HILLIARD & MUÑOZ, P.L.L.C.

/s/ Robert C. Hilliard
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EXHIBIT 1

Elect Justice
James A. Baker
(logo) For Texas Supreme Court

March 26, 1996

Dear

Of all the Republicans running for Supreme Court Justice, James Baker's race for Place 2 will be the toughest – and the most critical.

He's being challenged by Democrat Gene Kelley, who we're concerned will benefit from his well-known name. Texans need only remember when Don Yarborough was elected to the Supreme Court because voters mistook him for former United States Senator Ralph W. Yarborough.

Our concern has heightened since the release of the results of recent State and House Bar Association polls. In the 1996 State Bar Association poll, Baker received 9,377 or 81% of the votes cast – the highest percentage received by any of the four incumbent Supreme Court justices on this year's ballot. Kelley received the remaining 19%.

In the 1996 Houston Bar Poll, Baker was rated "qualified" or "well qualified" by 93% of his total, or 1,115 out of 1,199 votes. By contrast, Kelley received more "not qualified" votes – 877 or 91% of his total – than any other candidate for the Supreme Court.

Justice Baker is clearly and widely thought to be the more qualified candidate by the legal community, but we need your help to ensure Gene Kelley's well-known name

doesn't overcome Justice Baker's superior qualifications and abilities.

Will you please donate $500 or $250 to Justice James Baker's campaign today? Your contribution is critical to helping us inform Texans of the clear differences between the two candidates. Justice Baker is the only qualified candidate running for Place 2.

James Baker was appointed by Governor George W. Bush to the state's highest court in October, 1995, to fill the vacancy created by the resignation of Justice Bob Gammage. He has 10 years of experience as a Dallas Court of Appeals justice, and 30 years of experience practicing law.

Justice Baker is also an integral member of the Court's continued movement for reform. He is committed to fully and permanently restoring the integrity of the Court, and ensuring its decisions are honest and fair.

Gene Kelley, on the other hand, is rated unqualified by the overwhelming majority of the legal community.

We must get our message out to the voters. We must promote James Baker's qualifications, and the significance this election will have on preserving the Court's integrity. Television ads will be a necessity.

Please, help us support the *only* qualified candidate for Supreme Court Justice, Place 2. Send Justice James A. Baker your contribution *today*.

This race is critical. Although there are unequivocal differences between the two candidates, it will most definitely be the most difficult to win. Gene Kelley's high name recognition poses a significant threat to James

Baker and to Republicans, unless we can get our message out to the voters.

Thank you for your consideration.

Sincerely,

/s/ Tom Luce
Tom Luce

/s/ John L. Hill, Jr.
John L. Hill, Jr.

P.S. James Baker's race for Place 2 on the Texas Supreme Court will be the most difficult of our Republican candidates. Why? Because his opponent is Gene Kelley, whose well-known name can be enough to get him elected unless we educate the voters. Kelley is rated unqualified by the majority of our state's lawyers – join us in supporting the only candidate for Place 2, Justice James Baker. Please help today.

[Campaign Flyer Omitted In Printing]

May we please have the following information?

The Justice James A. Baker Campaign is required by the new Texas election law to collect the following from you:

_____

Name (please print)

_____

Occupation Job Title

_____

Employer
Is this a law firm? [ ] Yes [ ] No

_____

Home Work

_____

Spouse

_____

Spouse's Occupation Job Title

_____

Spouse's Employer
Is this a law firm? [ ] Yes [ ] No

If contributor is a minor, please check here and complete the information below.

Parent or Guardian's Name(s)

_____

Parent or Guardian's Occupation(s)

_____

Parent or Guardian's Employer(s)

Is this a law firm? [ ] Yes [ ] No

Under the new law affiliation with a law firm includes any partner, associate, shareholder or employee and any person designated "of counsel" to the firm or "of the firm." A contribution by the spouse or child of an individual is considered to be a contribution by the individual. The $30,000 contribution limit placed on all contributions from members of a firm includes contributions by their spouses and children and the law firm's general-purpose political committee.

VERIFICATION

STATE OF TEXAS §
§
COUNTY OF NUECES §

On this day, Robert C. Hilliard appeared before me, the undersigned notary public, and after I administered an oath to him, upon his oath, he said he read **RESPONDENTS' MOTION TO RECUSE JUSTICE JAMES A. BAKER**, the facts in it are within his personal knowledge, and are true and correct.

/s/ Robert C. Hilliard
Robert C. Hilliard

SWORN TO AND SUBSCRIBED before me by Robert C. Hilliard on the 9th day of April, 1996.

(SEAL) NANCY WEBSTER
MY COMMISSION EXPIRES
APRIL 1, 1998

/s/ Nancy Webster
Notary Public in and
for the State
of Texas

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing instrument was sent to all counsel of record listed below by fax and certified mail on this the 9th day of April, 1996.

/s/ Robert C. Hilliard
Robert C. Hilliard

FAX NO. 713/223-3717
CM/RRR Z 278 687 744

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APPENDIX C
IN THE SUPREME COURT OF TEXAS

No. 95-1036

MERRELL DOW PHARMACEUTICALS, INC.,
PETITIONER

v.

ERNEST HAVNER AND MARILYN HAVNER ON BEHALF OF THEIR MINOR CHILD KELLY HAVNER, RESPONDENTS

ON MOTION FOR REHEARING

ORDER

The motion for rehearing filed on behalf of the Havners is overruled. However, the tenor of that motion requires that we address the conduct of Respondent's counsel.

This is not the first time in this case that the Havner's counsel have engaged in less than exemplary conduct. Following the decision of the original panel of the court of appeals, which had reversed the judgment of the trial court and rendered judgment that the Havners take nothing, Robert C. Hilliard filed two briefs with the court of appeals which that court, sitting en banc, found to be "insulting, disrespectful, and unprofessional." *Merrell Dow Pharmaceuticals, Inc. v. Havner*, 907 S.W.2d 565, 566 (Tex. App. – Corpus Christi 1994) (en banc) (per curiam). The court of appeals further concluded that the briefs "evidence[d] a violation of the Texas Disciplinary Rules

of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness, or fitness." *Id.* The court of appeals accordingly forwarded copies of those briefs to the Office of General Counsel of the State Bar of Texas pursuant to Texas Code of Judicial Conduct, Canon 3(D)(2). *Id.*

In assessing the appropriate response to the motion for rehearing that has now been filed by Hilliard and his co-counsel in this Court, we agree with another of our courts of appeals who recently found it necessary to address attacks on the integrity of that court:

> A distinction must be drawn between respectful advocacy and judicial denigration. Although the former is entitled to a protected voice, the latter can only be condoned at the expense of the public's confidence in the judicial process. Even were this court willing to tolerate the personal insult levied by [counsel], we are obligated to maintain the respect due this Court and the legal system we took an oath to serve.

In re Maloney, 949 S.W.2d 385, 388 (Tex. App. – San Antonio 1997, no writ) (en banc) (per curiam); *see also Johnson v. Johnson*, 948 S.W.2d 835, 840-41 (Tex. App. – San Antonio 1997, writ requested)[1] (sanctioning counsel for disparaging remarks about the trial court and forwarding the court of appeals' opinion to the Office of General counsel, concluding that a substantial question had been raised about counsel's honesty, trustworthiness, or fitness as a lawyer).

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[1] An application for writ of error is pending in this Court, and we express no opinion on the merits of that appeal.

Court's possess inherent power to discipline an attorney's behavior. " 'Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence.' " *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (further observing that a federal court has the power to control admission to its bar and to discipline attorneys who appear before it) (quoting *Anderson v. Dunn*, 19 U.S. (1 Wheat.) 204, 227 (1821)); *see also Public Util. Comm'n v. Cofer*, 754 S.W.2d 121, 124 (Tex. 1988); *Johnson*, 948 S.W.2d at 840-41.

The Disciplinary Rules governing the conduct of a lawyer provide:

> A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

TEX. DISCIPLINARY R. PROF'L CONDUCT preamble ¶ 4, *reprinted in* TEX. GOV'T CODE, tit. 2, subtit. G app. A (Vernon Supp. 1997) (TEX. STATE BAR R. art. X, § 9).

Rule 8.02(a) of the Disciplinary Rules specifically states:

> A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth of falsity concerning the qualifications or integrity of a judge, adjudicatory official or public legal officer, or of a candidate for election or appointment to judicial or legal office.

Id. Rule 8.02(a).

The Legislature has also provided a mechanism for courts to sanction counsel who file pleadings presented for an improper purpose or to harass. TEX. CIV. PRAC. & REM. CODE §§ 10.001-10.005. In addition, one of the lawyers for the Havners, Barry Nace, is a non-resident attorney. His appearance in Texas courts is subject to the Rules Governing Admission to the Bar, including Rule XIX.

The specific portions of the "Respondents' Motion for Rehearing" filed in this Court that raise particular concerns are the "Statement of the Case for Rehearing" (pages 1-5), the "Brief of the Argument" (pages 8, 14, and 16), and the "Prayer for Relief" (pages 19-20). Counsel for Respondents Robert C. Hilliard of the firm of Hilliard & Muñoz, Barry J. Nace of the firm of Paulson, Nace, Norwind & Sellinger, and Rebecca E. Hamilton of the firm of White, White & Hamilton, P.C., are hereby afforded the opportunity to respond as to why the Court should not

1) refer each of them to the appropriate disciplinary authorities;

2) prohibit attorney Nace from practicing in Texas courts; and

3) impose monetary penalties as sanctions.

Any response must be filed in this Court by 5:00 p.m., Monday, November 24, 1997.

Done at the City of Austin, this 13th day of November, 1997.

JOHN T. ADAMS, CLERK
SUPREME COURT OF TEXAS

By /s/ Elizabeth A. Saunders
Elizabeth A. Saunders
Chief Deputy Clerk

(JUSTICE BAKER not sitting)

APPENDIX D

IN THE SUPREME COURT OF TEXAS

No. 95-1036

MERRELL DOW PHARMACEUTICALS, INC.,
PETITIONER,

v.

ERNEST HAVNER and MARILYN HAVNER ON
BEHALF OF THEIR MINOR CHILD,
KELLY HAVNER, RESPONDENTS.

On Motion for Rehearing

MOTION FOR CLARIFICATION OF ISSUES RAISED IN COURT ORDER DATED NOVEMBER 13, 1997

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COUNSEL FOR RESPONDENTS

ORAL ARGUMENT REQUESTED

IN THE SUPREME COURT OF TEXAS

No. 95-1036

MERRELL DOW PHARMACEUTICALS, INC.,
PETITIONER,

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ERNEST HAVNER and MARILYN HAVNER ON
BEHALF OF THEIR MINOR CHILD,
KELLY HAVNER, RESPONDENTS.

On Motion for Rehearing

MOTION FOR CLARIFICATION OF ISSUES RAISED IN COURT ORDER DATED NOVEMBER 13, 1997

COME NOW Robert C. Hilliard, Barry J. Nace, and Rebecca E. Hamilton, counsel for Respondents in the above-styled and numbered matter and serve and file this, their Motion for Clarification of Issues Raised in Court Order Dated November 13, 1997 ("Motion for Clarification"), and, in support thereof, respectfully show unto the Court the following:

1.0 ***Factual/Procedural Background.***

On July 24, 1997, Respondents' counsel, Robert C. Hilliard, Barry J. Nace, and Rebecca E. Hamilton, filed the Motion for Rehearing at issue here. On November 13,

1997, the Court issued its Order affording Respondents' counsel the opportunity to "respond as to why the Court should not 1) refer each of them to the appropriate disciplinary authorities; 2) prohibit attorney Nace from practicing in Texas courts; and 3) impose monetary penalties as sanctions." (Order at 4.) The Court since has extended the time for response to December 4, 1997. Should the Court grant this Motion for Clarification, Messrs. Hilliard and Nace and Ms. Hamilton request a further, brief extension of time to respond if any new issues are presented by the Court in its clarification.

2.0 ***Motion.***

The Court's November 13th Order raises substantial issues under the United States Constitution and Texas Constitution. *See* U.S. Const. amend. I ("Freedom of speech" and right "to petition the Government for a redress of grievances") and Tex. Const. art. I, § 8, 13, and 19 ("freedom of speech," "open courts," and "due course of law.").

In particular, the impact of the Order on the First Amendment rights of Mr. Hilliard, Mr. Nace, Ms. Hamilton and, more importantly, the Havner family is real and substantial. The Court simply states that it finds fault with the "tenor" of the Motion for Rehearing. (Order at 1.) The Court identifies, however, 10 of the 20 substantive pages of the Motion for Rehearing as "rais[ing] particular concerns." Clearly, the Court finds fault with particular language appearing in the Motion for Rehearing, yet has not delineated the language it finds troubling with any specificity.

Mr. Nace contributed not one word to any portion of the Motion for Rehearing. Further, of the pages the Court enumerates as problematic, Ms. Hamilton contributed only portions of pages 8, 14, and 16.

Given these facts, the Court's notice falls short of the specificity required by Texas Civil Practice & Remedies Code §§ 10.002(b) and 10.003, lacks the specificity required by principles of procedural due process under the U.S. Const. amend. V and XIV, § 1, and runs afoul of Respondents' and their counsels' rights under the Texas Constitution's due course of law and open courts provisions. Tex. Const. art. I, §§ 8, 13, and 19. In particular, the Texas Civil Practice & Remedy Code, the U.S. Constitution, and the Texas Constitution all require that "notice" under these circumstances describe the "specific" conduct offensive to the Court. Fundamental notions of fairness require no less. An objection to "tenor" of rhetoric in 10 of 20 pages of a brief is not sufficiently specific to apprise an attorney of conduct warranting monetary sanctions or referral to a grievance committee, much less the wholesale barring of him from practice.

When a Court sanctions and/or refers attorneys to a grievance committee because it finds words on pieces of paper to be of an objectionable "tenor" – and not because of distracting or divisive conduct in a court room – procedural due process and due course of law demand that such a Court identify with specificity the language of which it seeks to condemn the attorney. This conclusion is particularly true when, as here, the only avenue of appeal is to the United States Supreme Court.

The chilling effect on the exercise of First Amendment freedoms is of particular concern here, because Mr. Nace wrote no part of the Motion for Rehearing and Ms. Hamilton wrote only portions of pages 8, 14, and 16 – none of which, as far as she can ascertain – rise beyond the normal level of rhetoric normally employed by appellate practitioners, not to mention opinions of this very Court.

Procedural due process, due course of law, and Texans' rights to open courts strongly favor this Court clarifying its Order and granting Respondents' counsel additional time to respond to any clarifications so issued. U.S. Const. V and XIV, § 1, and Tex. Const. art. I, § 8, 13, and 19. Counsel for Respondents, therefore, request that this Court clarify the Order so that they may prepare an adequate response and defense to the allegations contained therein.

Respectfully submitted,

WHITE, WHITE
& HAMILTON, P.C.

Original Signed by
TODD W. WHITE
Todd W. White
State Bar No. 21332700
Rebecca E. Hamilton
State Bar No. 08837050

118 East Rusk Street
Rockwall, Texas 75087
Telephone: 972/771-8011
Telecopy: 972/722-3922

ATTORNEYS FOR RESPONDENTS

CERTIFICATE OF SERVICE

I certify that I served a copy of this Motion on all interested parties and their counsel. I have not served counsel for Merrell Dow Pharmaceuticals, Inc., as Petitioner did not seek sanctions against counsel for Respondents in connection with the Motion for Rehearing. I served this Motion by United States mail on this the 20th day of November, 1997.

Original Signed by
TODD W. WHITE
Todd W. White

VIA UNITED STATES MAIL
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APPENDIX E

IN THE SUPREME COURT OF TEXAS

No. 95-1036

MERRELL DOW PHARMACEUTICALS, INC.,
PETITIONER,

v.

ERNEST HAVNER and MARILYN HAVNER
ON BEHALF OF
THEIR MINOR CHILD, KELLY HAVNER,
RESPONDENTS.

On Motion for Rehearing

MOTION FOR HEARING OF ISSUES RAISED IN COURT ORDER DATED NOVEMBER 13, 1997

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COUNSEL FOR RESPONDENTS

ORAL ARGUMENT REQUESTED

IN THE SUPREME COURT OF TEXAS

No. 95-1036

MERRELL DOW PHARMACEUTICALS, INC.,
PETITIONER,

v.

ERNEST HAVNER and MARILYN HAVNER
ON BEHALF OF
THEIR MINOR CHILD, KELLY HAVNER,
RESPONDENTS.

On Motion for Rehearing

MOTION FOR HEARING OF ISSUES RAISED IN COURT ORDER DATED NOVEMBER 13, 1997

COME NOW Barry J. Nace and Rebecca E. Hamilton, counsel for Respondents in the above-styled and numbered matter and serve and file this, their Motion for Hearing of Issues Raised in Court Order Dated November 13, 1997 ("Motion for Hearing"), and, in support thereof, respectfully show unto the Court the following:

1.0 Factual/Procedural Background.

On July 24, 1997, Respondents' counsel, Robert C. Hilliard, Barry J. Nace, and Rebecca E. Hamilton, filed the

Motion for Rehearing at issue here. On November 13, 1997, the Court issued its Order affording Respondents' counsel the opportunity to "respond as to why the Court should not 1) refer each of them to the appropriate disciplinary authorities; 2) prohibit attorney Nace from practicing in Texas courts; and 3) impose monetary penalties as sanctions." (Order at 4.) The Order set a response date of November 24, 1997.

On November 14, 1997, Mr. Hilliard wrote the Court in letter form, requesting a hearing and an extension of time to respond to the Order. On November 17, 1997, Deputy Clerk, Elizabeth Saunders, informed Mr. Hilliard that the Court would extend his time for response until December 4, 1997.

Although Mr. Hilliard's letter referenced only his desire for an extension and a hearing, in an abundance of caution (and hope) Ms. Hamilton called Ms. Saunders that afternoon and asked whether the extension of time would apply to herself and Mr. Nace, as well (Mr. Nace being in trial in Virginia and having asked Ms. Hamilton to so ascertain). Ms. Saunders advised that the extension of time would extend to Ms. Hamilton and Mr. Nace, as well. Ms. Hamilton and Mr. Nace did not ask Ms. Saunders whether the denial of Mr. Hilliard's request for a hearing applied to them.

In moving now for a hearing, neither Ms. Hamilton nor Mr. Nace seek to have the Court burden itself by what it considers the re-addressing of matters already decided. Rather, counsel desire only to preserve an explicit record for themselves on the issue of requesting a

hearing. By the same token, however, neither Ms. Hamilton nor Mr. Nace file this Motion with the belief that the Court will deny it. Ms. Hamilton and Mr. Nace simply seek at this time that the Court grant them the opportunity for a hearing before the Court as to the important issues raised by the Court's November 13th Order.

2.0 Motion.

The Court's November 13th Order raises substantial issues under the United States Constitution and Texas Constitution. *See* U.S. Const. amend. I ("freedom of speech" and right "to petition the Government for a redress of grievances") and Tex. Const. art. I, § 8, 13, and 19 ("freedom of speech," "open courts," and "due course of law.").

In particular, the impact of the Order on the First Amendment rights of Mr. Hilliard, Mr. Nace, and Ms. Hamilton and, more importantly, the Havner family is real and substantial. Likewise, the precedent of an order sanctioning and/or referring to the grievance committee of Respondents' counsel (and, likewise, the barring from practice in the State of Texas of Mr. Nace) because of the "tenor" of their rhetoric and zealous representation will have a profoundly chilling effect on the exercise of freedom of speech by attorneys and others concerned with the judicial process throughout the State of Texas. (Order at 1.) The chilling effect is of particular concern here because Mr. Nace wrote no part of the Motion for Rehearing and Ms. Hamilton write portions of pages 8, 14, and 16 – none of which, as far as she can ascertain – rise

beyond the normal level of rhetoric employed by appellate practitioners.

Procedural due process, due course of law, and Texans' rights to open courts strongly favor this Court holding a hearing on the issues raised by the Order. U.S. Const. V and XIV, § 1, and Tex. Const. art. I, § 8, 13, and 19. The fact that review of this Court's decision in connection with the Order is limited to appeal to the United States Supreme Court supports further the conclusion that a hearing on these issues would be appropriate, healthy, and necessary.

Respectfully submitted,

WHITE, WHITE & HAMILTON, P.C.

Original Signed By
TODD W. WHITE

Todd W. White
State Bar No. 21332700
Rebecca E. Hamilton
State Bar No. 08837050

118 East Rusk Street
Rockwall, Texas 75087
Telephone: 972/771-8011
Telecopy: 972/722-3922

ATTORNEYS FOR
RESPONDENTS

CERTIFICATE OF SERVICE

I certify that I served a copy of this Motion on all interested parties and their counsel. I have not served counsel for Merrell Dow Pharmaceuticals, Inc., as Petitioner did not seek sanctions against counsel for Respondents in connection with the Motion for Rehearing. I served this Motion by United States mail on this the 20th day of November, 1997.

Original Signed By
TODD W. WHITE

Todd W. White

VIA UNITED STATES MAIL
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APPENDIX F

(Seal) **THE SUPREME COURT OF TEXAS**
Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

November 25, 1997

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Mr. John T. Flood
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RE: Case Number 95-1036

Style: MERRELL DOW PHARMACEUTICALS, INC.
v.
EARNEST HAVNER and MARILYN HAVNER on behalf of their minor child KELLY HAVNER

Dear Counsel:

The motions for hearing and for clarification were overruled in the above numbered and styled cause. (Justice Baker not sitting.)

Sincerely,

John T. Adams, Clerk

by /s/ Michael C. Murphey
Michael C. Murphey, Deputy

(Seal)

THE SUPREME COURT OF TEXAS

Orders Pronounced November 25, 1997

ORDERS ON CAUSES

THE MOTIONS FOR HEARING AND FOR CLARIFICATION ARE OVERRULED IN THE FOLLOWING CAUSE:

95-1036 MERRELL DOW PHARMACEUTICALS, INC. v. EARNEST HAVNER and MARILYN HAVNER on behalf of their minor child KELLY HAVNER; from Nueces County; 13th district (13-92-00540-CV, 907 SW2D 535, 03-17-95)

motion for hearing of issues raised in court order dated

November 13, 1997, overruled

motion for clarification of issues raised in court order dated

November 13, 1997, overruled

(Justice Baker not sitting)

APPENDIX G

No. 13-92-00540-CV

IN THE
SUPREME COURT
OF TEXAS

MERRELL DOW PHARMACEUTICALS, INC.,

Petitioner,

vs.

ERNEST HAVNER & MARILYN HAVNER
ON BEHALF OF THEIR MINOR CHILD
KELLY HAVNER,

Respondents.

Appealed from the Thirteenth Court of Appeals
At Corpus Christi, Texas

Individual Response of Barry J. Nace to Court Order of November 13, 1997[1]

Your Respondent initially requests an apology from this Court. The reasons follow.

Respondent Barry J. Nace received notice of the Order on November 13, 1997 when his office received telephone calls from numerous members of the news media. At the time, Mr. Nace was trying a case out of his home jurisdiction of the District of Columbia. He did not

[1] Barry J. Nace files this Individual Response to the Court's Order, but joins in the substance of the Joint Response being filed by other counsel.

know at the time what this matter was all about. Now, having read the Order, the Respondent is filled with numerous emotions: anger, sadness and disgust.

Anger exists for several reasons. As the attached affidavit (Exhibit 1) shows, the Respondent had nothing whatsoever to do with the pleading in question. This is confirmed by other documents filed in this case by Ms. Hamilton who correctly states, "Mr. Nace contributed not one word to any portion of the Motion for Rehearing". Anger prevails because this court *assumed* the Respondent had been involved notwithstanding (1) the fact that the Respondent never signed the pleading; (2) notwithstanding that at least one member of this court was aware that at the time of the filing of the pleading and for at least several days before, the Respondent was in San Diego, California, participating in a seminar on this very subject, as was a member of this Court; and (3) notwithstanding that the Respondent had at the invitation of this Court reluctantly agreed to participate in a seminar for the Texas Judiciary on this very issue. Despite all of that, this Court released its Order to the press without even having the courtesy to provide it to your Respondent first. One can only imagine the result had Respondent sent a pleading to the news media before filing it in Court. Your Respondent will address each of those points.

First, this Court did nothing to ascertain who wrote the pleading in question before releasing the Order to the news media. The Court could simply have issued an Order asking that basic question. Even a cursory view of the pleading in question would show that not only did the Respondent clearly not sign the pleading in question but that the wrong address appears under his name as

does an incorrect name of his firm. The correct address is "N" Street, N. W. – not "North Street". This appears at every instance when the address is given. That is, the address is given as "North Street, N. W.". One would hope the highest Court in the State of Texas would review pleadings when it issues Show Cause Orders closely enough to be sure of what it was doing before defaming and damaging a lawyer by innuendo! Had someone at the Court taken the time to look, the Court would have realized that the Respondent probably knows his own address. But it is clear that Respondent's signature appears nowhere on the document. Should the Court not have first ascertained under the circumstances the involvement in the pleading of each attorney? Or is this a return to "McCarthy days"? Certainly there is an air of McCarthyism about this matter as it is being conducted. This Court had even more ample reason to question the undersigned involvement as we shall see below.

Secondly, a member of this very Court was in the audience and participated in a seminar on the same issues involved in this case after the appellate decision was released and before the pleading in question was filed, as did your Respondent. That member of the Court was aware of the presence of the Respondent who also participated in the seminar and that knowledge should have at least raised some question about the undersigned's involvement. That seminar took place in San Diego, California on July 19 and your Respondent was in San Diego on July 18 thru July 25, 1997. The pleading in question was filed on July 24, 1997. Your Respondent did not even want to file a Petition for Rehearing because he was convinced that this Court – based on its opinion –

would never grant a rehearing for reasons that if expressed would obviously result in another "Show Cause Order."

Finally, in March of this year, the Respondent appeared at a Texas Judiciary Seminar on the issue of scientific evidence and the Daubert Case as part of a panel discussion. When the Respondent was first invited to speak on this matter, he had serious questions as to whether or not he should appear on a panel discussing such issues in light of the pending Havner case. The Respondent appeared, however, because counsel for Merrell Dow was appearing. The Respondent was told that was the way it was done in Texas. Therefore, your Respondent took more than a day out of his schedule at the request of the Texas Judiciary.

Your Respondent asks, what kind of court knows an attorney is attending and participating in a seminar at the very time the pleading is filed, knows an attorney has taken his time to appear at its Judicial Conference, and which can quickly ascertain the attorney clearly had not signed the pleading and yet issues a Show Cause Order to the news media before informing counsel? It is respectfully submitted that your Respondent did nothing to even suggest the kind of treatment he has received, nor should he have been subjected to the "tenor" or to the terror of the Order.

This Court by its four page Order, however, has held the Respondent up to criticism. This Court has damaged the good name of the Respondent and had the temerity to issue a Show Cause Order as to why the Respondent should not be prohibited from practicing in Texas courts.

The grief that this Court has caused the Respondent is certainly unwarranted. Does this Court not recognize that even a suggestion of a reference to the appropriate disciplinary authorities, a suggestion of prohibition from practicing in Texas courts, and a suggestion of imposition of monetary penalties as sanctions is bound to have adverse consequences upon the accused? Your Respondent is owed an apology by the Court and not simply a finding that sanctions are not merited or are not warranted against the Respondent. That would not be enough. Does this Court recognize the effect of what it has done? The monetary effect on the attorney, the effect on malpractice insurance for example? Further, it was all so unnecessary had just a modicum of consideration and thoughtfulness been given to the issue by the Court.

Moreover, were the Respondent paranoid, he would wonder whether or not there was an attempt being made to "get" at him because he is a Plaintiff's trial attorney.

However, while the Respondent had absolutely nothing to do with the preparation of or approval of the pleading in question, the Respondent is filled with a great sense of sadness that the highest Court in any jurisdiction would even contemplate taking any action against an attorney who filed such a pleading. Texas counsel has at all times tried to properly represent Kelly Havner with good reason. The bottom line is that this case was tried before a jury of twelve citizens of this state, and the case was well tried in a totally professional sense before an honorable, competent, well-respected member of the Texas Judiciary, who having listened to all of the evidence, denied the post-trial motions on the liability of the defendant and affirmed the jury's verdict. No one could

suggest intelligently that Plaintiff Kelly Havner did not produce strong expert testimony. This Court did not like that testimony.

Only a rare citizen would even be aware of the powers of the trial court to order remittitur, or order a new trial, or order judgment non obstante verdicto. Even more rare would be the citizen who would believe that an appellate court could disagree with a jury's verdict and refuse to even allow a child to get their day in court when the rules have been changed. Moreover, four out of five judges on the intermediate Appellate Court found no reason to overturn the decision in this case. They respected the jury's decision. Again, citizens of any jurisdiction would be shocked to know that fact also meant nothing in this girl's life. The jury verdict meant nothing, the trial court's decision meant nothing, the intermediate appellate court's decision meant nothing and Kelly Havner's quest and proof meant nothing. And she doesn't get a chance to prove her case under new rules.

Rare also would be the citizen of any jurisdiction who would not see the appearance of impropriety when seven days after an argument before the highest court of any state, one of the attorneys arguing the case sends a letter to other attorneys in the state printed on a Justice's campaign stationery to raise funds for the election of that Justice. What did this Court do about that? Nothing. With that background, what attorney would not be outraged at this Court's actual opinion?

For this Court to threaten the sanctions that it has threatened against the authors of the pleading in question because it did not appreciate the "tenor" of the motion

for reconsideration is simply a thin-skinned act of retaliation and a show of power. This Court in its Order cited two rules. The first deals with a demonstration of respect for the legal system and a recognition that a lawyer has the duty to challenge the rectitude of official action. The second deals with the truth or falsity or integrity of a judge.

Mr. Hilliard in zealously representing his client, Kelly Havner, as he should do, has clearly exercised his opportunity to challenge the rectitude of official action. Can he not challenge elected officials such as the members of this Court? Further, he has said nothing more than what has been expressed for some time about justice in Texas. He has noted that justice for Kelly Havner is a precursor of justice of the citizens of Texas. He has done so eloquently and for someone to suggest that he has not a sound basis for his statements would be appalling.

Experienced lawyers know that an appellate opinion can express any view of what has transpired before the case got to the Appellate Court and make it sound good. But there are boundaries and lines in the sand that should not be crossed. When that happens, it effects the respect of the citizenry for the system and that is the concern of your Respondent. No language could be too harsh for the jury tampering and appellate court tampering that appears to exist in the case of this little girl. That is, any ordinary citizen would be shocked to learn that the jury decision was tampered with, i.e. taken away, by another court. Such action requires close scrutiny and for someone to suggest otherwise is sad.

No attorney in this country has any more respect for the legal system and for the jury system than does the Respondent. But, can the Court believe that Kelly Havner, her parents, and those associated with her could possibly have respect for a legal system in which in a well tried case a jury found in their favor; four out of five judges in the intermediate court found in their favor; and yet not only is she not permitted to recover anything but she is not even given an opportunity to prove her case when the rules have been changed? While it is clearly not for a Court (this one or any other one) to decide whether or not a particular drug causes birth defects, that is exactly what this court did, regardless of the evidence. The rest of the opinion is subsumed by that fact and is thus nothing more than window dressing to try to support that opinion. This Court did not believe Bendectin causes birth defects and therefore, the jury decision had to be corrected. That, however, is not a system of law – it is a system of power. This Court has effectively stated that the jury was stupid, but this Court is smart. And then when a counsel sees such total disrespect and disregard for the jury system and the legal system and sees the effect it has on a child, and responds to it, overzealousness is unlikely to be possible. To condemn whomever wrote such a brief then is retribution for the sake of retribution, not justice. Whoever wrote the brief should not be condemned and vilified. Rather the author(s) should be looked upon as a hero(s).

This Court has taken this Respondent's good name and threatened him with sanctions without giving the slightest concern to the effect of such action nor its veracity. It is not enough to say "that is why we have

issued a show cause order." This Court should admit its error and apologize promptly to the Respondent.

Respectfully Submitted,

/s/ Barry J. Nace
Barry J. Nace, Esquire

CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing Response on all interested parties and their counsel. I have not served counsel for Merrell Dow Pharmaceuticals, Inc., as Petitioner did not seek sanctions against counsel for Respondents in connection with the Motion for Rehearing. I served this Motion by United States mail on this 26th day of November, 1997.

/s/ Barry J. Nace
Barry J. Nace

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No. 13-92-00540-CV

IN THE
SUPREME COURT
OF TEXAS

MERRELL DOW PHARMACEUTICALS, INC.,

Petitioner,

vs.

ERNEST HAVNER & MARILYN HAVNER
ON BEHALF OF THEIR MINOR CHILD
KELLY HAVNER,

Respondents.

Appealed from the Thirteenth Court of Appeals
At Corpus Christi, Texas

AFFIDAVIT

Barry J. Nace, Esquire having first been sworn according to law states as follows:

1) I did not prepare in any fashion the Pleading that is the subject of the Motion to Show Cause;

2) I did not see the Pleading that is the subject of the Order at any time prior to its filing, nor did I at any time approve of its filing;

3) I was totally unaware of the contents of the pleading that is the subject of the Order until after it was filed.

/s/ Barry J. Nace
Barry J. Nace, Esquire

District of Columbia:SS

Subscribed and sworn to before me this 26th day of November, 1997.

/s/ Melissa A. Van Vugt
Melissa A. Van Vugt
Notary Public, District of Columbia
My Commission Expires: October 14, 2002

APPENDIX H

IN THE SUPREME COURT OF TEXAS

No. 95-1036

MERRELL DOW PHARMACEUTICALS, INC.,
PETITIONER

v.

ERNEST HAVNER and MARILYN HAVNER
ON BEHALF OF THEIR MINOR CHILD,
KELLY HAVNER, RESPONDENTS.

On Motion for Rehearing

RESPONDENTS' COUNSEL'S REQUEST FOR JURY TRIAL AS TO ISSUES RAISED IN COURT ORDER DATED NOVEMBER 13, 1997

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COUNSEL FOR RESPONDENTS

ORAL ARGUMENT REQUESTED

IN THE SUPREME COURT OF TEXAS

No. 95-1036

MERRELL DOW PHARMACEUTICALS, INC.,
PETITIONER

v.

ERNEST HAVNER and MARILYN HAVNER
ON BEHALF OF THEIR MINOR CHILD,
KELLY HAVNER, RESPONDENTS.

On Motion for Rehearing

RESPONDENTS' COUNSEL'S REQUEST FOR JURY TRIAL AS TO ISSUES RAISED IN COURT ORDER DATED NOVEMBER 13, 1997

COME NOW Robert C. Hilliard, Barry J. Nace, and Rebecca E. Hamilton, counsel for Respondents in the above-styled and numbered matter (sometimes collectively "Respondents' Counsel"), and serve and file Respondents' Counsel's Request for Jury Trial as to Issues Raised in Court Order Dated November 13, 1997 ("Jury Request"), and, in support thereof, respectfully show unto the Court the following:

1.0 Factual/Procedural Background.

On July 24, 1997, Respondents' Counsel filed the Motion for Rehearing at issue here. On November 13, 1997, the Court issued its Show Cause Order affording Respondents' Counsel the Opportunity to "respond as to why the Court should not 1) refer each of them to the appropriate disciplinary authorities; 2) prohibit attorney Nace from practicing in Texas courts; and 3) impose monetary penalties as sanctions." (Order at 4.) The Show Cause Order initially reflected a response date of November 24, 1997. Later, however, the Court extended the response date to December 4, 1997.

2.0 Motion.

2.1 Because the Court Seeks to Impose Criminal Contempt Sanctions, Respondents' Counsel Are Entitled to a Jury.

The Show Cause Order reflects that the Court is offended by the "tenor" of Respondents' Counsels' motion for rehearing. (Order at 1.) *See Ex parte Chambers*, 898 S.W.2d 257, 259 ("Contempt of court is broadly defined as disobedience to or disrespect of a court by acting in opposition to its authority." (and cases cited therein)). Given that Respondents' Counsel violated no pre-existing order, the Court has accused Respondents' Counsel of "criminal contempt," as opposed to "civil contempt." *Ex parte Werblud*, 536 S.W.2d 542, 545-546 (Tex. 1976) (defining and distinguishing the concepts of "civil" v. "criminal" contempt). Accordingly, the Court seeks to issue an order of criminal – or punitive – contempt and seeks to punish Respondents' Counsel for their alleged

contempt by imposing monetary sanctions. (Order at 4.) *See, e.g., Ex parte Griffin*, 682 S.W.2d 261, 263 (Tex. 1984) (Robertson, J., concurring) ("Contempt is a 'unique' sanction.").

It is not clear whether the contempt that the Court alleges is present in the Motion for Rehearing is "constructive" or "direct," nor whether it is "petty" or "serious." *See Ex parte Werblud*, 536 S.W.2d at 545-546 (defining and distinguishing the concepts of "constructive" versus "direct" and "petty" versus "serious" contempt).[1] Because the Court has denied Respondents' Counsel's motion for clarification of the Show Cause Order, they are unable to ascertain whether the Court views the offense as "petty" or "serious."

This distinction is without significance under the circumstances, however, because in either case the law entitles Respondents' Counsel to specific notice, an evidentiary hearing, and a jury to assess all factual issues. As this Court observed in *Ex parte Bell*, "Punishment without issue or trial is so contrary to the usual and ordinary indispensable hearing before judgment, constituting due process, that the assumption that the court saw everything that went on in open court is required to justify the exception; but the need for immediate penal

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[1] As to the constructive or direct contempt issue, the law appears unsettled on whether words filed in a brief on rehearing can form the basis for a direct contempt in open court. *See Craig v. Harney*, 331 U.S. 367, 377 (1947) ("If the point had been made in a petition for rehearing and reduced to lawyer's language, it would be of trifling consequence.").

vindication of the dignity of the court created [the exception]." 894 S.W.2d 119, 129 (Tex. 1995) (ellipses in original). Indeed, the United States Supreme Court recently wrote:

> We have held the summary contempt exception to the normal due process requirements, such as a hearing, counsel, and the opportunity to call witnesses, "includes only charges of misconduct, in open court, in the presence of the judge, which disturbs the courts' business, where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court, and where immediate punishment is essential to prevent "demoralization of the courts' authority" before the public.

Pounders v. Watson, No. 96-1383, 1977 U.S.LEXIS 4045, at *7 (June 27, 1997) (quoting *In re Oliver*, 333 U.S. 257, 275 (1948)). *See also Ex parte Werblud*, 536 S.W.2d 542, 544-46 (1976) (recognizing right to hearing), and *Ex parte O'Fiel*, 246 S.W. 664, 665 ("[T]here can be no constructive contempt of court with reference to publications reflecting on the court or the judge thereof, unless the publication is not only of a defamatory character but is untrue." (quoting with approval *Ex parte Green*, 81 S.W. 723, 725 (1904))).

In *Ex parte Sproull*, this Court expressly recognized that the law entitles an accused contemnor to a trial by jury under Sixth Amendment if the contempt offense at issue is "major." 815 S.W.2d 250 (Tex. 1991). *See also Ex parte Griffin*, 682 S.W.2d 261 (Tex. 1984) ("The Sixth Amendment to the United States Constitution guarantees the right to jury trials for serious offenses, but not petty offenses." (quoting *Muñiz v. Hoffman*, 422 U.S. 454, 475-76 (1975))), and *Ex parte Johnson*, 654 S.W.2d 415, 420 (Tex.

1983) ("[P]rocedural safeguards for contempt do not derive from the sixth amendment, but arise under traditional notions of due process."). Again, as the Court has declined to clarify the Show Cause Order, Respondents' Counsel cannot ascertain the monetary sanction at issue – and, therefore, whether the alleged offense is "petty" or "serious."

In *Ex parte Johnson*, this Court held that, "The right to be present at trial and confront witnesses is fundamental and essential to a fair trial." 654 S.W.2d 415, 421 (Tex. 1983) (quoting *Pointer v. Texas*, 380 U.S. 400, 405 (1965)). It further observed, "The right is protected under Texas law by article 1, section 10 of the Texas Constitution." *Johnson*, 654 S.W.2d at 421. While a "summary exception" does exist to this rule, it does not apply here because the conduct at issue is (i) pure speech (ii) reflected in filed papers (iii) and not uttered in open court before the Justices.

2.2 Because the Court Seeks to Impose Criminal Sanctions Based on Respondents' Counsel's Pure Speech – Filed in Documents, Not Uttered in Open Court – Respondents' Counsel Are Entitled to a Jury.

The Show Cause Order raises substantial issues under the United States Constitution and Texas Constitution. *See* U.S. Const. amends. I ("freedom of speech" and right "to petition the Government for a redress of grievances"), V, VI, and XIV, and Tex. Const. art. I, § 8, 13, and 19 ("freedom of speech," "open courts," and "due course of law.").

The impact of the Show Cause Order on the First Amendment rights of Mr. Hilliard, Mr. Nace, and Ms. Hamilton and, more importantly, the Havner family, is real and substantial. Likewise, the precedent of an order sanctioning and/or referring to the grievance committee of Respondents' Counsel (and, likewise, the barring from practice in the State of Texas of Mr. Nace) because of the "tenor" of their rhetoric and zealous representation will have a profoundly chilling effect on the exercise of freedom of speech by attorneys and others concerned with the judicial process throughout the State of Texas. (Order at 1.)

Procedural due process, due course of law, and Texans' rights to open courts strongly favor this Court impaneling a jury to hear the factual issues raised by the Show Cause Order. U.S. Const. V and XIV, § 1, and Tex. Const. art. I, § 8, 13, and 19. The fact that review of this Court's decision in connection with the Show Cause Order is limited to appeal to the United States Supreme Court supports further the conclusion that a jury trial on these issues would be appropriate, healthy, and necessary.

2.3 Respondents' Counsel Need a Jury to Establish Whether the Conduct of Which the Court Accuses Them Constitutes an Obstruction to Justice of an Imminent Nature.

The United States Supreme Court has held that a showing of "obstruction" or "imminence" is an essential element of contempt, and not a mere factor to be considered. *In re McConnell*, 370 U.S. 230, 234 (1962) ("An

obstruction to the performance of judicial duty resulting from an act done in the presence of the court is, then, the characteristic upon which the power to punish for contempt must rest. This being true, it follows that the presence of that element must clearly be shown in every case where the power to punish for contempt is exerted." (quoting *Ex parte Hudgings*, 249 U.S. 378, 383 (1918))); *see also Holt v. Virginia*, 381 U.S. 131, 136 (1965) (addressing "vile, contemptuous, insulting language" used in allegations of bias and need to recuse, and observing, "Their convictions rest on nothing whatever except allegations made is motions for change of venue and disqualification of Judge Holladay because of alleged bias on his part.")

Texas law, of course, holds the same. *See, e.g., Ex parte Bell*, 894 S.W.2d 119, 127 (Tex. 1995) ("The essence of 'contempt' requires conduct that obstructs or tends to obstruct the proper administration of justice." (quoting *Brown v. United States*, 356 U.S. 148 (1958))), and *In re Gibson*, 811 S.W.2d 594, 596 (Tex. Crim. App. 1991) (*per curiam*) ("The 'essence' of contempt requires conduct that obstructs or tends to obstruct the proper administration of justice.").

2.4 Respondents' Counsel Need a Jury to Establish Whether their Conduct Was Intentional or in "Reckless Disregard" of the Truth; Indeed, the Law Entitles Respondents' Counsel to an Opportunity to Prove the Truth or Falsity of Language at Issue.

Of equal importance, regarding the First Amendment issues in general, "It is recognized that persons who make derogatory statements about public officials,

including judges, are protected by the First and Fourteenth Amendments of the United States Constitution from imposition of civil and criminal liability, unless the statement is made with knowledge that it is false or with reckless disregard of whether it is false or not." *State Bar of Texas v. Semaan*, 508 S.W.2d 429, 432 (Tex. Civ. App. – San Antonio 1974 writ ref'd n.r.e.) (citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and *Garrison v. Louisiana*, 379 U.S. 64 (1964)). Respondents' Counsel respectfully remind the Court that, "Any bridle upon a free flow of information to the people concerning the performance and qualifications of public officials will have little chance of gaining constitutional approval." *Semaan*, 508 S.W.2d at 432. Accordingly, an evidentiary hearing before a jury is necessary to establish truth, falsity, or reckless disregard, if any, at issue here.

WHEREFORE, PREMISES CONSIDERED, Respondents' Counsel, Robert C. Hilliard, Barry J. Nace, and Rebecca E. Hamilton, respectfully request that this Court grant them a jury to resolve all factual issues raised by the Show Cause Order that this Court issued on November 13, 1997, in connection with Appellees' Motion for Rehearing in the above-styled and numbered matter.

Respectfully submitted,

WHITE, WHITE & HAMILTON, P.C.

Original Signed By
TODD W. WHITE

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State Bar No. 21332700
Rebecca E. Hamilton
State Bar No. 09677700
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ATTORNEYS FOR
RESPONDENTS

CERTIFICATE OF SERVICE

I certify that I served a copy of this Motion on all interested parties and their counsel. I have not served counsel for Merrell Dow Pharmaceuticals, Inc., as Petitioner did not seek sanctions against counsel for Respondents in connection with the Motion for Rehearing. I served this Motion by United States mail on this the 26th day of November, 1997.

Original Signed By
TODD W. WHITE

Todd W. White

VIA UNITED STATES MAIL
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APPENDIX I

NO. 95-1036

IN THE SUPREME COURT OF TEXAS

MERRELL DOW PHARMACEUTICALS, INC.,
petitioner,

VS.

ERNEST and MARILYN HAVNER,
on Behalf Their Minor Child,
KELLY HAVNER,

Respondents,

On Motion for Rehearing

ROBERT C. HILLIARD'S MOTION FOR CLARIFICATION OF ISSUES RAISED IN COURT'S SHOW CAUSE ORDER DATED 11/13/97 & MOTION FOR HEARING IN CONNECTION WITH SHOW CAUSE ORDER

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COUNSEL FOR RESPONDENTS

ORAL ARGUMENT REQUESTED

NO.95-1036

IN THE SUPREME COURT OF TEXAS

MERRELL DOW PHARMACEUTICALS, INC.,

Petitioner,

VS.

ERNEST and MARILYN HAVNER,
on Behalf of Their Minor Child,
KELLY HAVNER,

Respondents,

On Motion for Rehearing

ROBERT C. HILLIARD'S MOTION FOR CLARIFICATION OF ISSUES RAISED IN COURT'S SHOW CAUSE ORDER DATED 11/13/97 & MOTION FOR HEARING IN CONNECTION WITH SHOW CAUSE ORDER

COMES NOW Robert C. Hilliard, Counsel for Respondents, Ernest and Marilyn Havner, on behalf of their minor child, Kelly Havner, in the above styled and numbered matter, and serves and files this his Motion for Clarification of Issues Raised in Court's Show Cause Order Dated 11/13/97 & Motion for Hearing in Connection with Show Cause Order ("Motion"), and, in support thereof, respectfully shows unto the Court as follows.

1.0 Factual/Procedural Background.

On July 24, Respondents' counsel, Robert C. Hilliard, Barry J. Nace, and Rebecca E. Hamilton (sometimes collectively "Respondents' Counsel"), filed the Motion for Rehearing at issue here. On November 13, 1997, the Court issued a "show cause" order (the "Show Cause Order"), affording Respondents' Counsel an opportunity to "respond as to why the Court should not 1) refer each of them to the appropriate disciplinary authorities; 2) prohibit attorney Nace from practicing in Texas courts; and 3) impose monetary penalties as sanctions." (Show Cause Order at 4.) The Court identified the "tenor" of the brief (Show Cause Order at 1) and 10 of the 20 pages of text (*id.* at 3) as being of particular concern. The Court sought a response by November 17, 1997.

On November 14, 1997, Mr. Hilliard ("Movant") wrote the Court in letter form, as he was in trial at the time and under severe time constraints, and requested both a hearing and an extension of time. Thereafter, Movant's secretary received a telephone call from an employee of the Court, informing that Movant needed to file a formal motion as to each issue and pay a separate filing fee for each. Prior to Movant complying, however, Deputy Clerk, Elizabeth Saunders, informed Movant's secretary – in a separate telephone call – that the Court would accept the letter as a two-fold motion after all, provided Movant paid a filing fee of $20.00. She informed at the same time that the Court, having considered Movant's request for an extension of time to respond to the Show Cause Order, would grant his request and extend the deadline (for all of Respondents' Counsel) to

December 4, 1997. The Court denied, however, Movant's request for hearing.

2.0 Motions.

2.1 Hearing.

Movant does not file this Motion to raise issues already raised by his November 14, 1997 letter, in so far as his request for a hearing is concerned. Movant only wishes to preserve the appellate record clearly as to his having asserted his right to a hearing. By the same token, Movant does not file this Motion with the assumption that the Court will deny it. Movant only asks the Court to consider, again, the implications of its Show Cause Order.

The Court's Show Cause Order clearly state that the Court seeks to impose monetary penalties as sanctions. (Show Cause Order at 4.) The Court bases its allegations of contempt on the "tenor" of the Motion for Rehearing and language of "particular concern." In other words, the Court has asked the Movant, as well as all of the Respondents' Counsel, to explain why the conduct at issue does not constitute "criminal contempt." ***See Ex parte Chambers***, 898 S.W. 2d 257, 259 (Tex. 1995) ("Contempt of court is broadly defined as disobedience to or disrespect of a court by acting in opposition to its authority"), (and cases cited therein); ***see also Ex parte Werblud***, 536 S.W.2d 542, 545-46 (Tex. 1976) (defining and distinguishing, among other things, the concepts of "civil" and "criminal" contempt).

Because "criminal contempt" is at issue, and because the Court is considering levying monetary penalties as a form of sanctions, Movant asks the Court to reconsider

the matter of whether to grant a hearing. Movant further requests that the Court grant a hearing at which Movant may tender evidence in his self-defense and why contempt is not appropriate on the facts here.

2.2 Clarification.

The Show Cause Order raises substantial issues under the United States Constitution and the Texas Constitution. *See* U.S. Const. amend I ("freedom of speech" and right "to petition the Government for a redress of grievances") and Tex. Const. art. I, sec. 8, 13, and 19 ("freedom of speech," "open courts," and "due course of law"). The Show Cause Order will impact, in particular, the First Amendment and Texas Constitutional rights of Messrs. Hilliard and Nace and Ms. Hamilton and, more importantly, the Havner family, in real and substantial ways.

The Show Cause Order states that the Court is concerned with the "tenor" of the Motion for Rehearing. (Show Cause Order at 1.) The Court identified 10 out of 20 textual pages of the Motion for Rehearing as "rais[ing] particular concerns." (Id. at 3.) Clearly, then, the Court finds particular language appearing in the Motion for Rehearing as problematic; yet, the Court has not delineated the precise language at issue. Nor does the Court identify any disruptive or boisterous conduct by Respondents' Counsel, nor any impediment to the administration of justice.

Given these facts, the Court's Show Cause Order does not provide the notice required by the Texas Civil Practice & Remedies Code secs. 10.002(b) and 10.003. It

also lacks the specificity required by due process and due course of law principles. *See* U.S. Const. amend. V and XIV, sec. 1, and Tex. Const. art. I, secs. 8, 13, and 19.

When a court sanctions and/or refers attorneys to the grievance committee because it finds words or pieces of paper to be of an objectionable "tenor" – and not because of distracting or divisive conduct in a court room – procedural due process and due course of law principles demand that such a court identify with specificity the language for which it seeks to condemn the attorney. This conclusion is particularly true when, as here, the only avenue of appellate review is to the United States Supreme Court.

The chilling effect on the exercise of First Amendment rights is of particular concern, here, where Mr. Nace wrote no part of the Motion for Rehearing and Ms. Hamilton wrote portions of only pages, 8, 14, and 16. Likewise, for attorneys across the state trying to gauge the level of passion and vehemence appropriate for appellate practice, the Court must define with specificity what it finds contemptuous or clients, such as Respondents, will suffer from attorneys whose duty to represent zealously is undercut by fear of punitive measure by higher courts.

Procedural due process, due course of law, and Texans' rights to open courts strongly favor this Court clarifying its Show Cause Order and granting Respondents' Counsel additional time to respond to any clarifications so issued. U.S. Const. amend. V and XIV, sec. 1, and Tex. Const. art. I, sec. 8, 13, and 19.

WHEREFORE, PREMISES CONSIDERED, Robert C. Hilliard, counsel for Respondents, Ernest and Marilyn

Havner, on behalf on their minor child, Kelly Havner, respectfully requests that this Court clarify its Order dated November 13, 1997 and conduct a hearing on the issues raised thereunder, and grant such other and further relief to which Respondents' Counsel may show themselves justly entitled.

Respectfully submitted,

Robert C. Hilliard
State Bar No. 09677700
HILLIARD & MONOZ
719 South Shoreline Boulevard
Suite 600

By: /s/ Robert C. Hilliard

ATTORNEY FOR
RESPONDENTS,
ERNEST AND
MARILYN HAVNER,
On Behalf of Their
Minor Child,
KELLY HAVNER

CERTIFICATE OF SERVICE

I certify that I served a true and correct copy of this document, by regular mail, on all of Respondents' Counsel, as identified below on this the 1st day of December, 1997. I have not served Petitioners' counsel as they have not sought the relief identified as under consideration by

the terms of the Court's Show Cause Order dated November 13, 1997.

/s/ Robert C. Hilliard
Robert C. Hilliard

cc w/enclosures

VIA UNITED STATES MAIL

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APPENDIX J

NO. 95-1036

IN THE SUPREME COURT OF TEXAS

MERRELL DOW PHARMACEUTICALS, INC.,

Petitioner,

VS.

ERNEST and MARILYN HAVNER, on Behalf of Their Minor Child, KELLY HAVNER,

Respondents.

On Motion for Rehearing

AFFIDAVIT OF ROBERT C. HILLIARD IN RESPONSE TO COURT'S SHOW CAUSE ORDER DATED 11/13/97

COUNTY OF NUECES)
)
STATE OF TEXAS)

On this the 4th day of December, 1997, Robert C. Hilliard appeared personally before me, the undersigned authority, and, upon being duly sworn by me, Mr. Hilliard attested, deposed, and swore as follows:

"1. My name is Robert C. Hilliard. I have been a lawyer since 1983, and during those near fifteen years have stayed out of any real trouble, mostly. I wrote the original motion for Rehearing to the 13th Court of Appeals which

this Court refers to in its recent Order. Before I wrote it I worried over it and over Kelly Havner, and over myself. For a long while. I sat at my desk remembering what I had heard during the five weeks of testimony, what I had seen in the eyes of the jury when they returned their verdict, what I had listened to from Merrell Dow's lawyer during oral argument at the appellate level and what I felt to be the truth of the outcome of Kelly's case. I knew as I sat there worrying, staring out at the bay that bright morning, I had a choice to make. Either stop trying cases with every ounce of feeling, talent, and love I could manage to muster or stand up for Kelly, for myself and for my sense of justice. I made my decision based on a true need to give my client what she deserved; a person who happened to be a lawyer that cared deeply and completely about her and her parents.

2. When this Court handed down its opinion, I knew as I read it that it was an epitaph for Texas Justice. To ignore how the rights of one little Texas girl and the decision of 12 honest Texans were also sacrificed would have been to pretend – and there is no passion in pretending. I wrote the Motion for Rehearing that this Court now complains of. I wrote it because I am Kelly Havner's lawyer. This Court believes it carries the wrong tune, perhaps it feels it is too measured and far away from the indentured rhythm of acquiescence which, if this Court is successful in its sanction, would be the new Order for those of us who watch this Court machete through law and precedent like so much dead bamboo. Too many results reached by this Court over the past few years have caused many around the country who are objective and fair minded to reluctantly conclude that this particular

body of Justices means to please only whose favor is catered. Yet, even the favored are finding it harder to hide their smirks and are beginning to feel an uneasy skittishness at the Court's blatancy, handshake or no handshake.

3. My need as a lawyer and a person was not to prod the response which has now occurred but to have an opportunity to explain in strong language and on behalf of my client why a respectful review of this Court's reasoning weighed against the record and existing case law leads to the conclusion that this opinion is a legal lie. Flat out.

4. Though the initial tenor of my Motion would succeed in getting the attention of the most stubborn mule should it have been a two-by-four rather than a pleading, the language gives way to strong and well-reasoned argument, fairly explaining why this Court, as a body, should reexamine its decision. If each one of you would take a copy of my motion to a quiet place, by yourself and spend and hour or two reading the substantive body of its contents, with a mind open not to shoving back but rather to the sweet taste of justice, clear as the creeks we all swam in when we were small and pure as the hope Kelly carries from her childhood, then your decision and your written opinion would carry honor and show Courage.

5. With much deference I feel allegiance to the Texas Supreme Court, as an institution, and to our legal profession; even though we all share some blame in allowing both to drift away from what justice was suppose to mean and what we pray it still means when we explain it to our own children. I spoke out on behalf of Kelly in a way that causes you to want to punish me. I did so not out of lack

of consideration, rather out of a zealous need to protect and guard both a little girl and the institution that is the Texas Supreme Court from its own members, members who are not necessarily right, not necessarily insightful, nor necessarily mean-spirited. I did so out of a faith in what is good. Little question this Court believes I did not have the right to protect justice for my client in this manner, nor does it believe I have a duty to my client to question who is guarding the guards. This Court is wrong.

6. Kelly inspires me and I am a lawyer. Yet, despite my best efforts and strongest beliefs, in the end I could not protect her from this Court. This Court has had their way with Kelly, dispensed its "new justice", and she has gone home. Now, this Court and I face each other. Still, I must stand on the edge of what matters and know this is my place, next to Kelly, or whomever asks me for help. My place will never be otherwise. Know from the attached letter that one very wise young woman has suffered unjustly as a direct and exact result of each of you. She has also come to her own conclusions as to what this was really about. So maybe all is not lost."

FURTHER, AFFIANT SAYETH NAUGHT.

/s/ Robert C. Hilliard
Robert C. Hilliard

SWORN TO AND SUBSCRIBED before me, the undersigned Notary Public on this the 4th day of December, 1997, to certify which witness by hand and seal.

(Seal) SUSAN F. TAYLOR
Notary Public
STATE OF TEXAS
My Comm. Exp. June 8, 2000

/s/ Susan Taylor
Notary Public,
Nueces County, Texas

APPENDIX K

IN THE SUPREME COURT OF TEXAS

No. 95-1036

MERRELL DOW PHARMACEUTICALS, INC.,
PETITIONER,

v.

ERNEST HAVNER and MARILYN HAVNER ON BEHALF OF THEIR MINOR CHILD, KELLY HAVNER,
RESPONDENTS.

On Motion for Rehearing

AFFIDAVIT OF REBECCA E. HAMILTON IN RESPONSE TO SHOW CAUSE ORDER DATED NOVEMBER 13, 1997

STATE OF TEXAS §
§
COUNTY OF ROCKWALL §

On this, the 4th day of December, 1997, Rebecca E. Hamilton appeared personally before me, the undersigned authority, and, upon being cautioned and sworn by me, Ms. Hamilton attested, deposed and swore as follows:

1. "I am Rebecca E. Hamilton. I am over the age of 18, have never been accused, charged, or convicted of any crime, misdemeanor (other than traffic, for which I have

taken defensive driving) or felony. I have never been sued nor have I ever been brought before the Grievance Committee of the State Bar of Texas on any complaint by anyone. None of my clients ever have so much as sent me a letter complaining about my services. I have no mental disabilities. I am fully competent to execute this Affidavit and have personal knowledge of the facts I aver herein.

2. I attended undergraduate school at Cornell University, College of Arts and Sciences, where I graduated with a B.A. in Archaeology in 1982. Thereafter, I worked for a legal aid organization, the Legal Resources Trust, in Cape Town, in the Republic of South Africa, as well as the Socio-Legal Studies Department of the University of Cape Town, through 1984.

3. I graduated with honors from the University of Texas, with a J.D. in 1987. During the years I was at U.T., I took a semester off and completed my work in Cape Town. These efforts resulted in two published articles on apartheid, one focusing on its effects on child custody allocation upon divorce among native African peoples and the other focusing on property laws of the Republic and how they shaped apartheid. The former article was published in a book consisting of articles on apartheid and its effects on the family. The American legal journal. *The National Black Law Journal*, published the latter.

4. In 1987, I gave birth to my daughter, Rachel G. S. King, one and a half months before I took and passed the Bar Exam. Thus, in November 1987, this Court admitted me to practice in the State of Texas. I currently am admitted to practice before the United States Supreme Court, the United States Court of Appeals for the Fifth and

Eighth Circuits, and the United States District Court for the Southern and Northern Districts of Texas.

5. Upon graduation, in 1987, I clerked for Justice Sam Bass, who sat at that time on the First Court of Appeals in Houston.

6. In 1988 I worked in Dallas for the law firm of Gibson, Dunn & Crutcher. In 1989, I accepted employment with the law firm of Jones, Day, Reavis & Pogue. While at Jones, Day, I wrote two articles, which the *Appellate Advocate*, the newsletter for the Appellate Section of the State Bar, published. I also joined the Continuing Legal Education and the Pro Bono Colleges of the State Bar of Texas. During this time period I resigned from the ABA, because I disagreed with its political statements supporting abortion. I have not rejoined the ABA.

7. In 1993, this Court appointed me to the Board of Directors of the Texas Equal Access to Justice Foundation. It is my understanding that the appointment was unanimous. Further, this Court reappointed me in 1996. It is my understanding that this decision, too, was unanimous.

8. While serving on the Board, I have edited, at the request of State Bar President Dean Frank Newton, the papers filed on behalf of the Court – as well as the Foundation – in the *Washington Legal Foundation* litigation, which matter currently pends before the United States Supreme Court on certiorari. My efforts have been entirely *pro bono*.

9. In 1993, I began work with John R. W. Cracken, a plaintiffs' attorney in Dallas, Texas. One year later, I

began work with Allison & Huerta, a plaintiffs' firm in Corpus Christi. Although Allison & Huerta since has dissolved, I continue to handle most of the partners' appellate work.

10. I currently have five matters pending before the Court:

> *Hyundia Motor Co. v. Alvarado,* Cause No. 95-0969;
>
> *Clawson v. Wharton County,* Cause No. 97-0190;
>
> *Chambers v. Wharton County;* Cause No. 97-0191;
>
> *Merrell Dow Pharmaceuticals, Inc. v. Havner;* Cause No. 95-1036; and
>
> *Martinez v. Uniroyal Goodrich Tire Co.,* Cause No. 95-1159.

I believe that my work in each of those cases reflects my respect for this Court and the judicial process. I encourage the Court to review my work in each of those cases.

11. I am a Republican. I have served as General Counsel for the Texas Young Republicans and as Assistant General Counsel for the National Young Republicans. I have supported every current member of this Court – Republican or otherwise.

12. I belong to no plaintiff or defense bar associations. Throughout my career as an attorney, I have represented defendants and plaintiffs on a roughly equal basis. I have defended – successfully – both doctors and insurance companies in large, bad faith suits.

13. I am a member of the University of Texas Chancellors' Council, having founded (along with my little

brother) a scholarship in honor of our father, Terrell H. Hamilton, who served as a fully tenured professor of Zoology at the University for nearly 25 years. In fact, every other member of my immediate family is a Harvard-educated scientist – my father was a biochemist; my mother is an engineering scientist (now retired) with a background in the history of science and scientific thought; and my brother is a particle physicist at Stanford University.

14. I described to my mother and brother the *Havner* case – in particular the plaintiffs' scientific evidence (my father being deceased by that time) – when Robert C. Hilliard first contacted me. They both agreed that the scientists' techniques were valid and the conclusions that the plaintiffs' experts had drawn were reasonable and sound.

15. Robert C. Hilliard had retained Allison & Huerta – after this controversial, first motion for rehearing, to argue the *Havner* case on *en banc* rehearing before the Corpus Christi Court of Appeals. Although Mr. Guy H. Allison was to argue that motion, I agreed to provide legal briefing in light of the discussions detailed in paragraph 13.

16. I provided briefing on legal matters *after* Mr. Hilliard's initial, controversial motion papers. I had no role in preparing the controversial, earlier work. Mr. Allison argued the matter on rehearing and the Corpus Christi Court of Appeals, sitting *en banc*, reversed its original decision.

17. I have continued to serve as counsel for Kelly Havner from that time to the present except during those periods when I was physically incapacitated.

18. Upon issuance of this Court's decision, Mr. Hilliard contacted me and asked me to work with him extensively on the Motion for Rehearing at issue here.

19. I wrote all the substantive legal portions of the Motion for Rehearing. I contributed nothing to the Motion for Rehearing that I believe to be disrespectful or offensive, much less contemptuous or sanctionable. I have acted at all times with utmost respect for this Court and the judicial process.

20. I acted then and act now in good faith belief that I was and am acting in the best interest of my clients. It was never my intent, and never has been, to act in a contemptuous or sanctionable fashion and I do not believe that I have done so.

21. I edited the Motion for Rehearing in its entirety, providing cite form, punctuation, and grammatical input.

22. I advised Mr. Hilliard to remove some of the portions of the Motion for Rehearing that I assume the Court finds objectionable. As he was lead counsel, he had the prerogative to refuse and he did so.

23. When he declined to do so, I told him that I needed to consider whether I would allow my name to appear on the Motion for Rehearing in its final form. I spent a substantial amount of time, under the circumstances, considering many factors that I felt bore on the issue of whether to allow my name to appear on the Motion for Rehearing. They were:

(a) I believed that the legal briefing section of the Motion for Rehearing was correct and strong. I was and am still proud of it;

(b) I believed that, to the extent any member of this Court remembers who I am, they would consider my work with credence and respect, which would benefit my clients;

(c) I believed that perhaps any residual goodwill and respect towards me would undercut any anger and resentment towards Messrs. Hilliard and Nace and, again, benefit my clients;

(d) I believed that, should I decline to allow my name to be used, it would undercut the strength of my clients' position and, as a member of the Bar, I owed my first duty to my clients; and

(e) I believed that the history of the case merited some expression of passion and shock – that is, after all, the nature of a rehearing motion as a general proposition – and that Mr. Hilliard and Kelly had a First Amendment right to express those feelings.

24. Based on the factors described in paragraph 23, and based on further discussion with scientists outside of the case (*i.e.*, my mother and brother), I believed in good faith that my clients' interests were best served by my allowing my name to appear on the cover of the Motion for Rehearing and signature block.

25. I did not sign the Motion for Rehearing.

26. It is my understanding that Mr. Barry J. Nace had either no input or virtually no input as to the Motion for Rehearing at issue."

FURTHER, AFFIANT SAYETH NAUGHT.

/s/ Rebecca E. Hamilton
Rebecca E. Hamilton

SWORN TO AND SUBSCRIBED before me, the undersigned Notary Public, on this the 4th day of December, 1997, to certify which witness by hand and seal.

(Seal) NANCY SEMPLE
MY COMMISSION
EXPIRES June 30, 2001

/s/ Nancy Semple
Notary Public
in and for the
State of Texas

Supreme Court, U.S.
FILED

No. 97-971508

MAR 11 1998
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1997

ERNEST HAVNER and MARILYN HAVNER, on Behalf of Their Minor Child, KELLY HAVNER,

and

ROBERT C. HILLIARD and BARRY J. NACE,

vs. *Petitioners,*

MERRELL DOW PHARMACEUTICALS, INC.,

and

THE SUPREME COURT OF THE STATE OF TEXAS, consisting of CHIEF JUSTICE THOMAS PHILLIPS, and ASSOCIATE JUSTICES, GREG ABBOTT, JAMES BAKER, CRAIG ENOCH, RAUL GONZALEZ, DEBORAH HANKINSON, NATHAN HECHT, PRISCILLA OWENS, and ROSE SPECTOR,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court of Texas

APPENDIX
Volume II, Pages 177-343

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IN THE SUPREME COURT OF TEXAS

No. 95-1036

MERRELL DOW PHARMACEUTICALS, INC.,
PETITIONER,

v.

ERNEST HAVNER and MARILYN HAVNER ON BEHALF OF THEIR MINOR CHILD, KELLY HAVNER,
RESPONDENTS.

On Motion for Rehearing

INDIVIDUAL RESPONSE OF REBECCA E. HAMILTON TO SHOW CAUSE ORDER DATED NOVEMBER 13, 1997
AND
MOTION TO RECUSE

COMES NOW Rebecca E. Hamilton, one of the counsel for respondents (sometimes collectively "Respondents' Counsel"), and serves and files this Individual Response of Rebecca E. Hamilton to Show Cause Order Dated November 13, 1997 and Motion to Recuse ("Response").

Ms. Hamilton files this instrument subject to and in light of the response of Robert C. Hilliard, Barry J. Nace, and Rebecca E. Hamilton and Motion to Recuse. She refers the Court to the "Factual and Procedural Background" portion thereof, as well as to the exhibits

attached thereto and to the Affidavit of Rebecca E. Hamilton In Response To Show Cause Order Dated November 13, 1997 ("Hamilton aff."). Ms. Hamilton files this Response to highlight issues relating to her own particular position for the Court's case of consideration and she respectfully shows as follows:

II.

RESPONSE OF REBECCA E. HAMILTON

A. Ms. Hamilton Has Committed No Contemptuous Or Sanctionable Conduct.

Ms. Hamilton has committed no contemptuous conduct because:

(1) Of the ten pages identified by the Court as being of particular concern in the Motion for Rehearing, Ms. Hamilton contributed substantively to only three, namely, pages 8, 14, and 16, none of which contain any language that appears to be of concern.

(2) Ms. Hamilton wrote only the legal analysis portion of the Motion for Rehearing and not the argument portions;

(3) Ms. Hamilton did not sign the Motion for Rehearing;

(4) Ms. Hamilton was not lead counsel on the case and therefore did not have the authority necessary to make final decisions as to appropriate use of rhetoric as to the Motion for Rehearing; and

(5) Ms. Hamilton acted at all times in good faith and with the sole intent to provide her

clients with effective and zealous representation within the bounds of her legal and ethical duties.

1. Ms. Hamilton Did Not Sign the Motion for Rehearing.

Ms. Hamilton urges the Court not to sanction her under Rule 13, Texas Rules of Civil Procedure, or Texas Civil Practice & Remedies Code § 10.001, as she did not sign the Motion for Rehearing. Hamilton Aff. at ¶ 25. Both Rule 13 and § 10.001 authorize sanctions against the signatory *only*.

In *GTE Communications Systems Corp. v. Tanner*, the Court held, "Rule 13 applies only to pleadings, motions and other papers *signed* by attorneys." 856 S.W.2d 725, 730 (Tex. 1993) (orig. proceeding) (Hecht, J.) (emphasis added). The same result obtains under Texas Civil Practice & Remedies Code §§ 10.001-006; section 10.001 provides in its preamble, "The signing of a pleading or motion as required by the Texas Rules of Civil Procedure constitutes a certificate by the signatory that to the signatory's best knowledge, information, and belief, formed after reasonable inquiry. . . . " (emphasis added.) In short, the Court should not sanction Ms. Hamilton because she did not sign the pleading at issue. Hamilton Aff. at ¶ 25.

2. Ms. Hamilton Did Not act Contemptuously, Grievably, or Sanctionably.

Regardless of the significance of the signature requirement, Ms. Hamilton does not believe that any

sanctions against her are appropriate. Given Ms. Hamilton's good reputation and long and continuing history of pro bono and other worthy activities, sanctions are certainly not necessary to obtain Ms. Hamilton's compliance with her legal and ethical obligations. *See* Hamilton Aff. at ¶¶ 2-3, 6-8, 11, and 13. Further, Ms. Hamilton's work in other cases pending before this Court shows her fit character, as well. Hamilton Aff. at ¶ 10.[1]

In *TransAmerican Natural Gas Co. v. Powell*, this Court wrote, "In our view, whether an imposition of sanctions is just is measured by two standards. First, a direct relationship must exist between the offensive conduct and the sanction imposed." [. . .] "Second, just sanctions must not be excessive." 811 S.W.2d 913, 917-18 (Tex. 1991) (Hecht, J.). The Court further observed, "The imposition of very severe sanctions is limited, not only by these standards, but by constitutional due process." *Id.* at 918 (quoting *Societe Internationale v. Rogers*, 357 U.S. 197, 209-10 (1958)). As Justice Gonzalez observed in his concurrence in *TransAmerican*, "[J]udges should not be trigger happy. They should first issue orders[.]" (Gonzalez, J., concurring). *Id.* at 920.

---

[1] Ms. Hamilton currently has four other matters pending before the Court:

Hyundai Motor Co. v. Alvarado, Cause No. 95-0969;

Clawson v. Wharton County, Cause No. 97-0190;

Chambers v. Wharton County; Cause No. 97-0190; and

Martinez v. Uniroyal Goodrich Tire Co., Cause No. 95-1159.

Ms. Hamilton encourages the Court to review her work in each of those other cases.

One Texas court has spelled out the application of *TransAmerican* more fully in the context of "bad faith" use of the judicial process. In *Kutch v. Del Mar College*, the Corpus Christi Court of Appeals observed:

> Inherent power to sanction exists to the extent necessary to deter, alleviate, and counteract bad faith use of the judicial process, such as any significant interference with the traditional core functions of Texas courts.
>
> Accordingly, for inherent power to apply, there must be some evidence and factual findings that the conduct complained of significantly interfered with the court's legitimate exercise of one of these powers.

831 S.W.2d 506, 510 (Tex. App. – Corpus Christi 1992, no writ). With these principles in mind, Ms. Hamilton believes that the Court will determine that sanctions are not appropriate under the circumstances.

As Ms. Hamilton's affidavit proves, she only drafted the legal analysis sections of the Motion for Rehearing. Hamilton Aff. at ¶ 22. She advised Mr. Hilliard to remove certain portions of the Motion for Rehearing that she believed were of concern. *Id.* at ¶ 22. Mr. Hilliard chose not to do so, as was his right as lead counsel, signed the Motion for Rehearing, and filed it. *Id.* at ¶ 22. Ms. Hamilton is unable to identify any offensive language drafted by her or any act of contemptuous or sanctionable act committed by her *Id.* at ¶ 20.

B. If The Court Penalizes Ms. Hamilton on the Facts Here, It Impairs Her Constitutional Rights to Free Speech, as Well as Her Clients' Free Speech *and* Zealous Representation Rights.

Any decision by this Court to punish Ms. Hamilton and, therefore, Kelly calls into play the protections of the First, Fifth, Sixth, and Fourteenth Amendments of the United States Constitution, as well as the free speech, open courts, and due course of law provisions of the Texas Constitution. *See* U.S. Const. amends. I, V, VI, and XIV, and Tex. Const. art. I, §§ 8, 13, and 19.

As to Kelly, Ms. Hamilton respectfully reminds the Court that, "Most importantly, the rights of litigants may be infringed by the abusive exercise of this power." *Kutch v. Del Mar College*, 831 S.W.2d 501, 510 (Tex. App. – Corpus Christi 1992, no writ). To the extent that Kelly has been punished for Ms. Hamilton's conduct. Ms. Hamilton passionately urges the Court to again rehear the legal issues and punish Ms. Hamilton only – *give Kelly her new trial under the new law the Court has created.* No language by Kelly's attorneys should alter this and, to the extent such may have occurred, her federal First and Sixth Amendment rights have been compromised, as well as her rights under article I of the Texas Constitution.

Kelly prevailed before the Corpus Christi Court of Appeals because of an emotional and vehement motion (which pre-dates Ms. Hamilton's involvement in this case) not unlike the one at issue here. That court rewarded her efforts to catch its attention with a complete reversal of position in her favor. If this Court should decide to punish Kelly and Ms. Hamilton as the Show

Cause Order portends, it will chill both their efforts to pursue her case further by appeal to the United States Supreme Court by, among other things, requiring Ms. Hamilton to focus her energies on her self-defense when she should be preparing further appellate papers.

Of additional importance are the First, Fifth, Sixth, and Fourteenth Amendment rights of Ms. Hamilton, and the attorneys and litigants throughout Texas with cases on appeal. *See also* Tex. Const. art. I, §§ 8, 13, and 19. Appellate attorneys' efforts will be chilled should the court sanction or otherwise find Ms. Hamilton in contempt here. This is the most serious implication of the Court's decision. Attorneys have and will have no guide for when representation is "too zealous" and rhetoric is "too much." For example, Ms. Hamilton has shown a copy of pages 8, 14, and 16 of the Second Motion for Rehearing to several local attorneys – all members of the defense bar. (These are the only pages to which Ms. Hamilton contributed that the Court notes as being of concern.) Not one could ascertain the language the Court perceives as contemptuous and sanctionable, nor can Ms. Hamilton. Hamilton Aff. at ¶ 20.

C. Ms. Hamilton Has Constitutional Rights to Adequate Notice, a Hearing, a Jury, and the Recusal of This Court.

Ms. Hamilton, like all Texans, is entitled to adequate notice and a hearing. "[D]ue process and the Sixth Amendment guarantee a defendant charged with contempt such as this 'an opportunity to be heard in his defense – a right to his day in court. . . . ' " *See Holt v.*

Virginia, 381 U.S. 131, 136 (1965) (quoting *In re Oliver*, 333 U.S. 257, 273 (1948)), and *Ex parte Carney*, 903 S.W.2d 345, 346 (Tex. 1995) (*per curiam*) ("Due process of law demands that before a Court can punish for a contempt not committed in its presence, the accused must have full and complete notification of the subject matter, and the show cause order or other means of notification must state when, how and by what means the defendant has been guilty of the alleged contempt.") (quoting *Ex parte Edgerly*, 441 S.W.2d 514, 516 (Tex. 1969)); *see also Ex parte Alloju*, 907 S.W.2d 486, 487 (1995) (*per curiam*) (addressing whether a person may be held in contempt if the sanction imposed is coercive only and not punitive and holding that, regardless of whether coercive or punitive, the accused contemnor must have hearing before the Court). Here, the Court has denied Ms. Hamilton both of these fundamental elements of due process.

In *Ex parte Chambers*, this Court held that notice and hearing with evidence was necessary in a case of direct, criminal contempt. 898 S.W.2d 257, 259-60 (Tex. 1995). Clearly, then, in a case of indirect, constructive contempt, based on the "tenor" of an attorney's briefing, notice and an evidentiary hearing are necessary. The Court has declined to identify what specific language on what pages is of concern. Accordingly, Ms. Hamilton does not have adequate notice. The Court also has denied her a hearing. Ms. Hamilton respectfully contends that these two decisions are erroneous.

Ms. Hamilton is entitled to a jury to ascertain the truth or reckless disregard, if any, of the Second Motion for Rehearing. *See Holt v. Virginia*, 381 U.S. 131, 136 (1965) (noting that the contemnor was constitutionally deprived

by his lack of opportunity to prove the truth or falsity of his charges against the court of bias), and *Ex parte Sproull*, 815 S.W.2d 250 (Tex. 1991) (accused contemnor entitled to a trial by jury under Sixth Amendment if major offense); *see also Ex parte Griffin*, 682 S.W.2d 261 (Tex. 1984) ("The Sixth Amendment to the United States Constitution guarantees the right to jury trials for serious offenses, but not petty offenses.") (quoting *Muñiz v. Hoffman*, 422 U.S. 454, 475-76 (1975)), and *Ex parte Johnson*, 654 S.W.2d 415, 420 (Tex. 1983) ("[P]rocedural safeguards for contempt do not derive from the sixth amendment, but arise under traditional notions of due process.").

In *Ex parte Johnson*, this Court held that, "The right to be present at trial and confront witnesses is fundamental and essential to a fair trial." 654 S.W.2d 415, 421 (Tex. 1983) (quoting *Pointer v. Texas*, 380 U.S. 400, 405 (1965)). It further observed that, "The right is protected under Texas law by article 1, section 10 of the Texas Constitution." *Johnson*, 654 S.W.2d at 421. Ms. Hamilton asks only for the same rights afforded thousands of Texans each day, who face loss of liberty and property.

Ms. Hamilton respectfully urges that this Court recuse itself as to the grievance issues because, "The Grievance Committee is an administrative agency of the judicial department and is the arm of the Supreme Court in the discharge of its professional policing duties." *State Bar of Texas v. Semaan*, 508 S.W.2d 429, 434 (Tex. Civ. App. – San Antonio 1974, writ ref'd n.r.e.), and *State v. Sewell*, 487 S.W.2d 716, 719 (Tex. 1972). A referral by this Court of Ms. Hamilton to the Grievance Committee is a referral of her to itself. The Court thus should recuse itself and allow another judicial body to make such a decision.

Ms. Hamilton further urges that this Court should recuse itself as to the contempt, grievance, and/or sanctions issues because of the factual matters regarding which she is entitled to an evidentiary hearing and jury. The Show Cause Order threatens Ms. Hamilton's ability to practice law, to engage in free speech, and already has damaged her good reputation in the legal community. The Court has denied her a hearing. If the Honorable Court reconsiders and allows Ms. Hamilton the fundamental right to adduce evidence in support of the truth, or the lack of reckless disregard thereof, of the language in the Second Motion for Rehearing, another court should sit to hear the evidence. Further, Justice Gonzalez already has spoken about this pending matter to the media, making both factual and opinion statements relevant thereto. (*See* Exhibit 3 to Response of Robert C. Hilliard, Barry J. Nace, and Rebecca E. Hamilton to Show Cause Order dated November 13, 1997 and Motion to Recuse.)

Accordingly, pursuant to rules 16.1-3 of the Texas Rules of Appellate Procedure, Ms. Hamilton moves the Court to recuse itself *as a body*. She respectfully refers the Court to rule 18b(2)(a) and (b), Texas Rules of Civil Procedure. Alternatively, Ms. Hamilton moves that Justice Gonzalez recuse himself from any deliberation as to this matter, because of his comments to the media. She respectfully refers Justice Gonzalez to Rule 18b(2)(d), Texas Rules of Civil Procedure

WHEREFORE, PREMISES CONSIDERED, Rebecca E. Hamilton respectfully request that this Court decline to enter an order of contempt or sanctions, that it decline to refer this matter to the Grievance Committee of the State Bar of Texas, and that it take no action penalizing her for

her participation in representing Kelly Havner. Alternatively, Ms. Hamilton asks for adequate notice of her alleged wrong-doing, an evidentiary hearing at which a jury may decide all factual issues, and that the court refer the issue of whether it recuse itself to another judicial official, unless it decides at this time to recuse itself as a body.

Respectfully submitted,

WHITE, WHITE & HAMILTON, P.C.

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ATTORNEYS FOR RESPONDENTS

CERTIFICATE OF SERVICE

I certify that I served a copy of this Response on all interested parties and their counsel. I have not served counsel for Merrell Dow Pharmaceuticals, Inc., as Petitioner did not seek sanctions against counsel for Respondents in connection with the Motion for Rehearing. I served this Motion by United States Mail on this the 4th day of December, 1997.

/s/ Todd W. White
Todd W. White

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VERIFICATION

STATE OF TEXAS)
)
COUNTY OF ROCKWALL)

On this the 4th day of December, 1997, Rebecca E. Hamilton appeared before me, the undersigned notary public, and after I administered an oath to her, upon her oath, she said she had read this the Individual Response of Rebecca E. Hamilton to Show Cause Order Dated November 13, 1997 and Motion to Recuse ("Response"), and that the facts pertaining to the Motion to Recuse

portion of the Response are within her personal knowledge and are true and correct.

/s/ Rebecca E. Hamilton
Rebecca E. Hamilton

SWORN TO and SUBSCRIBED before me, the undersigned Notary Public, on the 4th day of December, 1997, to certify which witness my hand and seal.

[SEAL] NANCY SEMPLE
MY COMMISSION EXPIRES
June 30, 2001

/s/ Nancy Semple
Notary Public in and for the
State of Texas

APPENDIX M

IN THE SUPREME COURT OF TEXAS

No. 95-1036

MERRELL DOW PHARMACEUTICALS, INC.,
PETITIONER,

v.

ERNEST HAVNER and MARILYN HAVNER
ON BEHALF OF THEIR MINOR CHILD,
KELLY HAVNER, RESPONDENTS.

On Motion for Rehearing

RESPONSE OF ROBERT C. HILLIARD, BARRY J. NACE, AND REBECCA E. HAMILTON TO SHOW CAUSE ORDER DATED NOVEMBER 13, 1997 AND MOTION TO RECUSE

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ORAL ARGUMENT REQUESTED

IN THE SUPREME COURT OF TEXAS

No. 95-1036

MERRELL DOW PHARMACEUTICALS, INC.,
PETITIONER,

v.

ERNEST HAVNER and MARILYN HAVNER
ON BEHALF OF THEIR MINOR CHILD,
KELLY HAVNER, RESPONDENTS.

On Motion for Rehearing

RESPONSE OF ROBERT C. HILLIARD, BARRY J. NACE, AND REBECCA E. HAMILTON TO SHOW CAUSE ORDER DATED NOVEMBER 13, 1997 AND MOTION TO RECUSE

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IN THE SUPREME COURT OF TEXAS

No. 95-1036

MERRELL DOW PHARMACEUTICALS, INC.,
PETITIONER,

v.

ERNEST HAVNER and MARILYN HAVNER
ON BEHALF OF THEIR MINOR CHILD,
KELLY HAVNER, RESPONDENTS.

On Motion for Rehearing

RESPONSE OF ROBERT C. HILLIARD, BARRY J. NACE, AND REBECCA E. HAMILTON TO SHOW CAUSE ORDER DATED NOVEMBER 13, 1997 AND MOTION TO RECUSE

COME NOW Robert C. Hilliard, Barry J. Nace, and Rebecca E. Hamilton, counsel for Respondents in the above-styled and numbered matter (sometimes collectively "Respondents' Counsel"), and serve and file this Response of Robert C. Hilliard, Barry J. Nace, and Rebecca E. Hamilton to Show Cause Order Dated November 13, 1997 and Motion to Recuse ("Response"), and, in support thereof, respectfully show unto the Court the following:

I.
FACTUAL AND PROCEDURAL BACKGROUND

A. Five Years Ago, Kelly Won Her Case Under Then-Prevailing Law.

In 1991, a Nueces County jury began hearing the claims of Respondent, Kelly Havner ("Kelly"). The jury ruled in Kelly's favor in 1992; and, on June 1, 1992, the trial court entered judgment on the jury's verdict. Two years later, on March 17, 1994, the Corpus Christi Court of Appeals reversed the jury's verdict in its entirety. Texas law held no precedent for its decision.

B. Three Years Ago, the Corpus Christi Court of Appeals Stunned the Texas Court System, as Well as Kelly's Attorneys, When It Took Away Her Verdict.

The Corpus Christi Court's decision stunned the Texas legal community, as well as Kelly's attorneys. The Houston Court of Appeals for the 14th District, wrote passionately as to the injustice of the decision. *See Maritime Overseas Corp. v. Ellis*, 886 S.W.2d 780, 785-86 (Tex. App. – Houston [14th Dist.] 1994, writ granted). The 14th Court observed:

> *Havner's* conclusion totally ignores the expert's training, experience, knowledge, even treatment, test-tube analysis and chemical composition analysis. Needless to say, we disagree with that conclusion by a panel of our sister court. Our view of long standing Texas precedents reveals that Experts qualified on the basis of their experience, training, treatment, and knowledge, who testify in terms of reasonable medical probability not only constitute some evidence of

> causation, but are frequently determinative of the issue. . . . If *Havner* becomes binding precedent it its present form, we presume that our instructions to the jury based on Tex. R. Civ. P. 226a will have to be eliminated or certainly modified. No longer could we with judicial integrity instruct jurors that they "are the sole judges of the credibility of the witnesses and the weight to be given to their testimony."

Id. (citation omitted.)

Writings of Justice Hecht evidence further the furor evoked by the Corpus Christi Court's decision – and the flux of the law over issues relating to factual and legal sufficiency in cases of "novel scientific evidence." *See Maritime Overseas Corp. v. Ellis*, 40 Tex. Sup. Ct. J. 110 (Nov. 15, 1996) (Hecht, J., dissenting on denial of application for writ of error). Concerned over the legal issues revolving around the "novel scientific evidence" adduced in *Ellis*, and the Court's initial failure to grant Maritime's application for writ of error, Justice Hecht wrote:

> Today the Court granted applications for writ of error in three cases, and the motions for leave to file petitions for writ of mandamus in two cases. [. . .] Why were these cases granted and the present case denied? I cannot answer, partly because I do not know, and partly because I cannot say. [. . .] I do not intend in any way to impugn the motives of other Justices.

Id. at 113.

Upset, in particular, with a perceived lack of accountability on the part of individual Justices when voting on whether to grant an application for writ of error (because

the Count conducts the vote in secret), Justice Hecht wrote further:

> I have become convinced, however, that if each of the eight Justices participating in the decision had been constrained to explain his or her position publicly, the vote would have been different, and the application would have been granted. [. . .] "It is as well to remember that neither secrecy of the court's deliberation or later secrecy about what went on during that deliberation rests in the nature of things or in any ordinance of God. [. . .] I personally suspect that our own secrecy practice began when decision began to be postponed beyond the close of argument, with an eye to avoiding misapprehension and disappointment, and then to avoid any financial speculation. *And I suspect the carryover into later secrecy about past deliberations to represent partly a closing of ranks to protect the court from criticism or attack, and in later years a similar closing to allow free discussion with no possible repercussions in a re-election campaign."*

Id. at 113-14 (emphasis added) (quoting Arthur S. Miller & D.S. Sastri, *Secrecy and the Supreme Court: On the Need for Piercing the Red Velour Curtain*, 22 Buffalo L. Rev. 799, 809-10 (1973)).

C. Kelly, Nevertheless, Won her Case on Rehearing After Her Attorneys Filed Controversial and Vehement Papers.

Robert C. Hilliard, as stunned as by the Corpus Christi Court's initial decision as was the 14th court, filed the first rehearing papers in this cause, on April 1, 1994.

After Petitioner, Merrell Dow Pharmaceuticals, Inc. ("Merrell"), opposed Respondents' efforts, Mr. Hilliard filed "Appellees' Response to Merrell's Opposition to Appellees' Motion for Rehearing and En Banc Consideration ("First Motion for Rehearing"). (Respondents' Counsel attach hereto a copy of the First Motion for Rehearing as "Exhibit 1.") Notwithstanding – indeed, perhaps because of – the passionate rhetoric reflected in his First Motion for Rehearing, on August 10, 1995, the Corpus Christi Court of Appeals conceded the error of its initial decision and, on rehearing *en banc*, issued a new opinion affirming the jury's verdict.

Although the Corpus Christi Court of Appeals did refer Mr. Hilliard to the grievance committee, because of the language he employed in the First Motion for Rehearing, *it did not sanction Mr. Hilliard or otherwise attempt to find him in contempt* – perhaps because Kelly won subsequent to his filing of the First Motion for Rehearing.

D. Two Years Ago, Merrell Sought Review by This Court.

On November 17, 1995, Merrell filed its Application for Writ of Error ("Application") to this Court and the normal briefing practice began.[1] On March 19, 1996, the

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[1] Respondents' Counsel recently called the Court to verify the Application's filing date. A clerk informed Respondents' Counsel that Merrell filed its Application on December 11, 1995. The certificate of service on the copy of the Application that Merrell forwarded to Kelly, however, reflects a November 17, 1995 filing date. Respondents' Counsel therefore are unsure of the correct date. They refer in the text to Merrell's date as

parties argued the case to the Court, previously having submitted extensive briefing.

At the same time as these events unfolded, lead counsel for Merrell, Mr. John L. Hill, Jr., was engineering a statewide campaign to raise over $500,000.00 for sitting Justice Baker. Mr. Hill did not notify or in any way apprise Messrs. Hilliard and Nace, nor Ms. Hamilton, of his efforts in this regard. Nor did he apprise the other members of this Court – as was his duty under the Texas Disciplinary Rules of Professional Conduct. *See* Tex. Disciplinary R. Prof. Conduct 3.05(b) (1995), *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G app. (Vernon 1988 & Pamph. 1998) (State Bar Rules art. X, § 9). Nor did Justice Baker. *See* Texas Code Jud. Conduct, Canons 2(B), 3(B)(1) and (D)(2), 4(A)(1), and 5, *reprinted in* Tex. Gov't Code Ann. tit. 2, subtit. G app. (Vernon Pamph. 1998). Despite this, no member of this Court issued a show cause order requiring Mr. Hill or Justice Baker to explain these failures.

E. After Kelly's Attorneys Learned Merrell's Lead Attorney, Mr. Hill, Was Engineering a $500,000.00 Fundraising Campaign in Support of Justice Baker's Re-Election, Kelly Prevailed on a Recusal Motion.

Mr. Hilliard received a copy of Mr. Hill's fundraising letter on behalf of Justice Baker shortly after oral argument. Immediately thereafter, on April 11, 1996, Kelly

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reflected on the Application's certificate of service because Rule 13 recognizes the presumption of good faith that attaches to all filed pleadings. Tex. R. Civ. P. 13 ("Courts shall presume that pleadings, motions, and other papers are filed in good faith.").

moved to recuse Justice Baker. Respondents' Counsel attach a copy of the Motion to Recuse (with the fundraising letter as an exhibit thereto) as "Exhibit 2." Justice Baker immediately and properly – but belatedly – recused himself.

F. Five Months Ago, Kelly Lost, Again, on Initial Appeal and Her Attorneys, Again, Filed Controversial and Vehement Rehearing Papers.

The case languished on appeal for over a year. Then, on July 9, 1997, the Court issued its opinion, reversing the jury's verdict and the Corpus Christi Court of Appeals' decision, concluding that Kelly did not deserve so much as a new trial, despite the fact that the Court appeared to create new law on what constitutes legally sufficient evidence in cases involving expert testimony. This was the second time Kelly's case had generated new law.

On July 24, 1997, Respondents' Counsel filed the motion for rehearing at issue (the "Second Motion for Rehearing"). The matter languished nearly another half year, until, on November 13, 1997, this Court summarily denied Kelly's request for a rehearing and remand for a new trial. The Court further ordered that her counsel show cause why they should not be found in contempt and monetarily sanctioned, referred to the grievance committee, and – in the case of Mr. Nace – barred from practice in the State of Texas (the "Show Cause Order"), because of the "tenor" of the Second Motion for Rehearing.

Since November 13, 1997, all three of Kelly's counsel – whom she fully supports in these endeavors – respectfully have asked this Court to grant them a hearing on the Show Cause Order and to clarify the Show Cause Order. The Court has denied their requests without comment. Respondents' Counsel also have moved for a jury trial. To date, Respondents' Counsel has received no ruling on this motion.

II.
RESPONSE

A. Respondents' Counsel Have Committed No Contemptuous Conduct.

1. The Court Accuses Respondents' Counsel of Committing Criminal Contempt.

The Court is offended by the "tenor" of Respondents' Counsels' motion for rehearing, which it apparently considers contemptuous. (Show Cause Order at 1.) *See Ex parte Chambers*, 898 S.W.2d 257, 259 (Tex. 1995) ("Contempt of court is broadly defined as disobedience to or disrespect of a court by acting in opposition to its authority." (and cases cited therein)). The Court has accused Respondents' Counsel of "criminal contempt," as opposed to "civil contempt" – civil contempt requiring the violation of a pre-existing order. *Ex parte Werblud*, 536 S.W.2d 542, 545-46 (Tex. 1976) (defining and distinguishing the concepts of "civil" and "criminal" contempt). Accordingly, the Court seeks to issue a punitive decree of contempt by levying monetary sanctions. (Show Cause Order at 4.) *See* Tex. R. Civ. P. 13 ("Attorneys . . . who make statements in pleading which they know to be

groundless and false . . . shall be held guilty of contempt."), and *Ex parte Griffin*, 682 S.W.2d 261, 263 (Tex. 1984) (Robertson, J., concurring) ("Contempt is a 'unique' sanction.").

Although it is not clear whether the contempt that the Court alleges is present in the Second Motion for Rehearing is "constructive" or "direct," nor whether it is "petty" or "serious" (because the Show Cause Order lacks specificity)[2], in any of these circumstances the law entitles Respondents' Counsel to specific notice and an evidentiary hearing. *See, e.g., Ex parte Chambers*, 898 S.W.2d at 262 ("Full and unambiguous notice of the accusation of contempt must be served on the alleged contemnor"), and *Ex parte Bell*, 894 S.W.2d 118, 129 (Tex. 1995) ("Punishment without issue or trial is so contrary to the usual and ordinary indispensable hearing before judgment, constituting due process[.]"). *See generally* William W. Kilgarlin & Scott A. Ozmun, *Contempt of Court in Texas – What You Shouldn't Say to the Judge*, 38 Baylor L. Rev. 291, 302-303 (1986).

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[2] *Cf. Ex Parte Werblud*, 536 S.W.2d at 545-46 (defining and distinguishing the concepts of "constructive" versus "direct" and "petty" versus "serious" contempt). For example, the Show Cause order fails to state the amount in monetary penalties that the Court seeks; thus, Respondents' Counsel are unable to ascertain whether the contempt at issue is "petty"or "serious." As to the constructive or direct contempt issue, the law appears unsettled on whether words filed in a brief on rehearing even can form the basis for a direct contempt in open court. *See Craig v. Harney*, 331 U.S. 367, 377 (1947) ("If the point had been made in a petition for rehearing and reduced to lawyer's language, it would be of trifling consequence.").

Respondents' Counsel respectfully submit that they find themselves at a peculiar disadvantage in responding to the Court's Show Cause Order because: (1) the Court has denied them specific notice of the charges and precise amounts of the sanctions at issue; and (2) the Court has denied them any hearing, much less an evidentiary hearing Respondents' Counsel believe that due process, and notions of basic fairness, entitle them to notice and a hearing. The Court, however, appears not to agree. Therefore, and without waiving these complaints, Respondents' Counsel endeavor to respond to the Show Cause Order as best they can.

2. The Passionate and Vehement Language At Issue Does Not Disrupt the Administration of Justice.

The Court premises its accusations of criminal contempt on the "tenor" of the Second Motion for Rehearing, identifying 10 out of 20 pages as being of "particular concern." (Show Cause Order at 1 and 3.) Because the Court has declined to clarify its Show Cause Order and specify the precise language on these pages that it finds contemptuous, Respondents' Counsel have categorized the language they believe to be at issue into the following broad categories: (1) language suggesting "bias" or "result orientation"; (2) language suggesting failure to follow existing case law; (3) language suggesting failure to resolve the matter on appeal expeditiously[3]; and (4) negative metaphor.

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[3] Respondents' Counsel respectfully note that Texas courts frequently so comment without sanction by this Court. *See, e.g.,*

The Show Cause Order does not suggest that Respondents' Counsels' conduct was "boisterous" or "disruptive." Nor could the Court so contend, given that the allegedly objectionable language at issue appeared in a written document filed with the court and not in a face-to-face confrontation in open court. Indeed, Justice Gonzalez' recent and out-of-the-ordinary statements on the pending issues now before the Court to the media prove Respondents' Counsel's conduct was not boisterous or disruptive – according to Justice Gonzalez, the Court was on vacation at the time of its filing. (Respondents' Counsel attach hereto a copy of the article from *Texas Lawyer* that contains Justice Gonzalez' statements as "Exhibit 3.") Respondents' Counsel believe that the fact that nearly half a year elapsed between the filing of Second Motion for Rehearing and the Court's Show Cause Order shows that no appellate disruption occurred.

Under these circumstances, no contemptuous conduct can be said to have occurred. After all, "The law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude, able to thrive in a hardy climate." *Craig v. Harney*, 331 U.S. 367, 376 (1947).

Eagle Properties, Ltd. v. Scharbauer, 816 S.W.2d 559, 563 (Tex. App. – El Paso 1991, writ denied) (Osborne, C.J. concurring) ("This is another case which has been placed in 'appellate orbit.' "). Further, Texas law appears to render the subject appropriate for comment. *See* Tex. Gov't Code § 21.001(b) ("A court shall require that proceedings be conducted with dignity and in an orderly and *expeditious* manner and control the proceedings so that justice is done." (emphasis added)).

When mere words on paper are all that is at issue, "The vehemence of the language used is not alone the measure of the power to punish for contempt[;]" rather, it is, "[T]he fires which it kindles must constitute an imminent, nor merely a likely, threat to the administration of justice." *Id.*

In other words, Respondents' Counsels' conduct, which evidently went unnoticed at first, actually must have disrupted the Court or otherwise constituted an imminent threat to the administration of justice for this Court to hold them in contempt. *In re Little*, 404 U.S. 553, 555 (1972) (quoting *Craig v. Harney*, 331 U.S. at 376). A showing of "obstruction" or "imminence" is an essential element of contempt, and not a mere factor to be considered. *In re McConnell*, 370 U.S. 230, 234 (1962) ("An obstruction to the performance of judicial duty resulting from an act done in the presence of the court is, then, the characteristic upon which the power to punish for contempt must rest. This being true, it follows that the presence of that element must clearly be shown in every case where the power to punish for contempt is exerted.") (quoting *ex parte Hudgings*, 249 U.S. 378, 383 (1918)); *see also Holt v. Virginia*, 381 U.S. 131, 136 (1965) (addressing "vile, contemptuous, insulting language" used in allegations of bias and need to recuse, and observing, "Their convictions rest on nothing whatever except allegations made in motions for change of venue and disqualification of Judge Holladay because of alleged bias on his part.").

Texas law, of course, agrees. *See, e.g., Ex parte Bell*, 894 S.W.2d 119, 127 (Tex. 1995) ("The essence of 'contempt' requires conduct that obstructs or tends to obstruct the proper administration of justice.") (quoting *Brown v.*

United States, 356 U.S. 148 (1958)), and *Ex parte Gibson,* 811 S.W.2d 594, 596 (Tex. Crim. App. 1991) (*per curiam*) ("The 'essence' of contempt requires conduct that obstructs or tends to obstruct the proper administration of justice.").

Given that the language that Respondents' Counsel assume is at issue consists of suggestions of bias and result orientation, a lack of expedience in issuing opinions, and negative metaphor – all being examples of language that this Court has employed in describing itself (*see* § B.2., below) – Respondents' Counsel do not believe that the record reflects contempt. The Court may not like the "tenor" of the Second Motion for Rehearing, but this is not enough to support a finding of contempt for, "a judge may not hold in contempt one 'who ventures to publish anything that tends to make him unpopular or to belittle him.' " *Craig v. Harney,* 331 U.S. 367, 373 (1947) (quoting *Craig v. Hecht,* 263 U.S. 255, 280 (1923) (Holmes, J., dissenting, joined by Brandeis, J.).

a. Respondents' Counsel Did Not Disrupt the Administration of Justice.

None of the language that Respondents' Counsel believe to be at issue constitutes an "obstruction of the administration of justice." The absence of disruptive conduct by Respondents' Counsel renders this so. In *In re Little,* the U.S. Supreme Court held that statements by petitioner to the trial court "that the court was biased and prejudged the case" did not constitute boisterous or otherwise disruptive conduct and, thus, could not be the basis for a finding of contempt, even though the accused

uttered them in open court. 404 U.S. 553, 554-55 (1972); *see also In re McConnell*, 370 U.S. 230, 234 (1962) (disruption must be "clearly" evidenced by record).

In *Ex parte Curtis*, the Texas Court of Criminal appeals likewise held that the record was devoid of evidence of disruption of judicial administration in any way, notwithstanding the accused contemnor's statements in open court that:

> Merely because I feel that you are acting in favor of this defendant in derogation of the State's case illegally and improperly . . . I think you're acting like a biased judge trying to help this defendant beat a darn good case.

568 S.W.2d 363, 366 (Tex. Crim. App. 1978). This very Court recently has held, "Offensive comments, even those spoken in open court, are not contumacious unless they are disruptive or boisterous." *Ex parte Bell*, 894 S.W.2d 119, 127 (Tex. 1995) (and cases cited therein). Respondents' Counsel do not believe that the record shows their comments to have been "disruptive" and do not believe that words on a page can be held to be "boisterous."

In a judicial system premised on the election of officials, the reasoning behind these rulings is compelling: "Judges who stand for reelection run on their records. That may be a rugged environment. Criticism is expected. Discussion of their conduct is appropriate, if not necessary." *Craig v. Harney*, 331 U.S. 367, 377 (1947). Respondents' Counsels' rhetoric does not exceed the level of that in *Craig* or *Ex parte Curtis*. Further, Respondents' Counsels' rhetoric occurred in filed pleadings – not open court.

Thus, Respondents' Counsel have committed no contemptuous conduct.

b. Respondents' Counsels' Conduct Does Not Pose Any Imminent Threat of Disruption of the Administration of Justice.

The language believed to be at issue appeared in pages of a brief that Respondents' Counsel filed with the Court five months ago; it did not occur in open court. Respondents' Counsel are aware of no change in the Court's administration of justice over the past five months, nor has this Court suggested any. These facts preclude a finding of contempt because such language did and cannot cause "immediate" or "imminent" harm. As the United States Supreme Court expressly had declared:

> The danger must not be remote or even probable; it must immediately imperil[.] The law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. . . . [C]ourts must be on guard against confusing offenses to their sensibilities with obstruction to the administration of justice.

In re Little, 404 U.S. 554, 555 (1972) (quoting *Brown v. United States*, 356 U.S. 148, 153 (1958)). Likewise, this court recently has held, "To preserve order in the courtroom for the proper conduct of business, the court must act instantly to suppress disturbance or violence or physical obstruction or disrespect to the court, when occurring in open court[.]" *Ex parte Bell*, 894 S.W.2d 119, 129 (Tex. 1995) (quoting *Cooke v. United States*, 267 U.S. 517, 534 (1925)). Respondents' Counsel believe that when, as here,

the language at issue is in filed papers – and not presented in open court – and has been on file for nearly half a year, no imminent threat exists.

3. The Entry of a Decree of Summary Contempt Is Inappropriate on the Facts.

By denying Respondents' Counsel adequate notice and a hearing, this Court engages in summary contempt. In so doing, Respondents' Counsel respectfully contend that the Court exceeds its power – regardless of the authority upon which it seeks to premise its decision. *See* Tex. R. Civ. P. 13 and Tex. Civ. Prac. & Rem. Code §§ 9.003, 10.003, and 10.006 (Vernon Supp. 1998). Sanctions issued pursuant to the Court's inherent contempt authority are likewise subject to these basic, due process requirements. The United States Supreme Court wrote in June of this year:

> We have held the summary contempt exception to the normal due process requirements, such as a hearing, counsel, and the opportunity to call witnesses, "includes only charges of misconduct, in open court, in the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court, and where immediate punishment is essential to prevent "demoralization of the court's authority" before the public.

Pounders v. Watson, 1997 U.S. LEXIS 4045, at *7 (June 27, 1997) (quoting *In re Oliver*, 333 U.S. 257, 275 (1948)). And, only two years ago in *Ex parte Chambers*, this Court held that notice and an evidentiary hearing are necessary in a

case of direct, criminal contempt. 898 S.W.2d 257, 259-60 (Tex. 1995). This Court held, "Full and unambiguous notice of the accusation of contempt must be served on the alleged contemnor." *Id.* at 262 (quoting *Ex parte Adell*, 769 S.W.2d 521 (Tex. 1989)). Clearly, then, in a case of indirect, constructive contempt (such as this one), based on the "tenor" of an attorney's briefing, notice and an evidentiary hearing are necessary.[4]

B. Respondents' Counsel Have Engaged in No Sanctionable Conduct.[5]

As a preliminary matter, Respondents' Counsel do not believe the Court may sanction either Mr. Nace or Ms. Hamilton under rule 13 or Tex. Civ. Prac. & Rem. Code § 10.001. Neither signed the Second Motion for Rehearing. Both rule 13 and § 10.001 authorize sanctions against the signatory *only*. Mr. Nace and Ms. Hamilton respectfully direct the Court's attention to the affidavits on file in connection with the Court's Show Cause Order to

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[4] Respondents' Counsels' right to and need for notice and an evidentiary hearing applies regardless of whether the contempt at issue is direct or indirect. In *Ex parte Bell*, this Court wrote, "When the contempt is not in open court [*i.e.*, "constructive" or "indirect"], however, there is no such right or reason in dispensing with the necessity of charges and the opportunity of the accused to present his defense by witness and argument." 894 S.W.2d 119, 129 (Tex. 1995) (citing *Cooke v. United States*, 267 U.S. 517, 536 (1925)).

[5] The Court does not identify the authority on which it premises its power to sanction Respondents' Counsel. As to the Court's inherent, contempt authority, Respondents' Counsel refers the Court to § A, above.

evidence their assertions to this effect. In *GTE Communications Systems Corp. v. Tanner,* the Court held, "Rule 13 applies only to pleadings, motions and other papers *signed* by attorneys." 856 S.W.2d 725, 730 (Tex. 1993) (orig. proceeding) (Hecht, J.) (emphasis added). The same result obtains under Tex. Civ. Prac. & Rem. Code §§ 10.001-.006; section 10.001 provides in its preamble, "*The signing of a pleading or motion* as required by the Texas Rules of Civil Procedure constitutes a certificate by the signatory that to the signatory's best knowledge, information, and belief, formed after reasonable inquiry. . . . " (Emphasis added.) In short, the court should not sanction either Mr. Nace or Ms. Hamilton.

Regardless of the significance of the signature requirement, Respondents' Counsel do not believe that any sanctions are appropriate or necessary. Respondents' Counsel respectfully direct the Court to its opinion in *TransAmerican Natural Gas Co. v. Powell,* in which the Court wrote, "In our view, whether an imposition of sanctions is just is measured by two standards. First, a direct relationship must exist between the offensive conduct and the sanction imposed." [. . .] "Second, just sanctions must not be excessive." 811 S.W.2d 913, 917-18 (Tex. 1991) (Hecht, J.). The Court further observed, "The imposition of very severe sanctions is limited, not only by these standards, but by constitutional due process." *Id.* at 918 (quoting *Societe Internationale v. Rogers,* 357 U.S. 197, 209-10 (1958)). As Justice Gonzalez observed in his concurrence in *TransAmerican,* "[J]udges should not be trigger happy. They should first issue orders[.]" (Gonzalez, J., concurring). *Id.* at 920.

One Texas court has spelled out the application of *TransAmerican* more fully when "bad faith" use of the judicial process is at issue. In *Kutch v. Del Mar College,* The Corpus Christi Court of Appeals observed:

> Inherent power to sanction exists to the extent necessary to deter, alleviate, and counteract bad faith use of the judicial process, such as any significant interference with the traditional core functions of Texas courts. Accordingly, for inherent power to apply, there must be some evidence and factual findings that the conduct complained of significantly interfered with the court's legitimate exercise of one of these powers.

831 S.W.2d 506, 510 (Tex. App. – Corpus Christi 1992, no writ). With these principles in mind, Respondents' Counsel believe that the Court will determine that sanctions are not appropriate under the circumstances.

1. Sanctions Are a Species of "Contempt" and, Accordingly, Are Subject to the Laws That Protect Those Accused of Contempt.

Respondents' Counsel again respectfully remind the Court that, "Inherent power to sanction exists to the extent necessary to deter, alleviate, and counteract bad faith use of the judicial process, such as any significant interference with the traditional core functions of Texas courts. Accordingly, for inherent power to apply, there must be some evidence and factual findings that the conduct complained of significantly interfered with the court's legitimate exercise of one of these powers." *Kutch v. Del Mar College,* 831 S.W.2d 506, 510 (Tex. App. –

Corpus Christi 1992, no writ). In other words, due process limits a court's power to sanction. *See id.* (and cases cited therein). "The traditional Due Process protections of notice and hearing are also necessary before imposition of sanctions." *Id.* at 511 (citing *Sears, Roebuck & Co. v. Hollingsworth,* 293 S.W.2d 639, 642 (Tex. 1956)).

2. Respondents' Counsel Used the Court's Own Language; They, Therefore, Cannot Be Said to Have Used Sanctionable Language.

Respondents' Counsel find it difficult to understand how the Court could sanction them for using the same type of language the Court uses to describe itself. Indeed, Respondents' Counsel could have supported the language they assume is at issue with cites from the Court's own writings. As examples, Respondents' Counsel refer the Court to the writings of Chief Justice Phillips and Justices Abbott, Baker, Cook, Cornyn, Doggett, Enoch, Gammage, Gonzalez, Hecht, Hightower, Owen, Spears and Spector, fourteen officers of the Court whom this Court never has referred to the grievance committee or otherwise sanctioned, to the best of Respondents' Counsels' knowledge:

a. Members of This Court Frequently Refer to Its Bias and Result Orientation.

(1) Under the guise of "no evidence" review, the majority has today once again rejected that "sound determination of the jury.[6]

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[6] *C&H Nationwide, Inc. v. Thompson,* 903 S.W.2d 315, 332 (Tex. 1994) (Doggett, J., dissenting).

(2) There are several ways in which the legislature could have written its enactment to satisfy Justice Hecht. [. . .] Only recently Justice Hecht attempted to apply this same approach to a civil service statute that met with his personal disapproval.[7]

(3) As if this were not enough injustice for one opinion, the majority concludes that those Texans who have unpleasant "working conditons" deserve less protection from our product safety laws than the rest of us.[8]

(4) Undoubtedly the insurance industry provides an important service to our society, but I see no reason why it should not have to comply with the law like the rest of us. But the majority's mission in recent months has been to dismantle, as much as possible, the different safeguards that insurance policyholders and beneficiaries have been previously assured by the laws of Texas.[9]

(5) Instead of fairness to all, the majority has replaced protection of insureds with protection of insurers, leaving the insurance industry largely free to do as it pleases.[10]

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[7] *Id.* at 334, 338 n.11.

[8] *Dresser Indus., Inc. v. Lee*, 880 S.W.2d 750, 756 (Tex. 1993) (Doggett, J., dissenting, joined by Gammage and spector, JJ.).

[9] *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 33 (Tex. 1994) (Doggett, J., concurring, joined by Gammage, J.).

[10] *Id.*

(6) The majority is committed to fulfilling its social agenda at any cost – mere precedent, a procedural rule, a statute or the Texas Constitution present no obstacles on the way to achieving whatever it perceives to be of ultimate benefit.[11]

(7) This decision merely represents a predetermined result in search of a rationale.[12]

(8) Empowered by this new, self-bestowed authority, the majority proceeds to reexamine the evidence from the perspective of an insurance company rather than, as required by the Texas Constitution, in the light most favorable to the verdict.[13]

(9) The majority summarily declares all of this as "no evidence" without even bothering to discuss it.[14]

(10) Given the determination of the majority to assume for itself the duties and powers of a jury, anyone – a judge, an attorney, a litigant, or a legal scholar – will be hard-pressed, in any given case, to understand the operative standard of appellate review – whether fundamental rules articulated in existing precedent govern, or whether what's really at work is some special unwritten standard of review, grounded in

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[11] *Id.* at 34.

[12] *National Union Fire Ins. Co. v. Dominguez*, 873 S.W.2d 373, 377 (Tex. 1994) (Doggett, J., dissenting, joined by Gammage, J.).

[13] *Id.*

[14] *Id.* at 378.

an overriding fear that insurers could actually be compelled to pay claims.[15]

(11) This same type of "elitist view that our safety laws should afford less security to the poorly educated," which permeates *Dresser*, has today been extended to eliminate another important legal guarantee previously available to Texas consumers.[16]

(12) Instead of competent legal analysis, the majority substitutes itself for the jury in qualitatively evaluating the evidence and declaring that placement of a door-jamb label afforded a quite ample warning. With this type of approach the previously applicable Pattern Jury Charge can be tossed in the scrap heap. The majority has engaged in a series of word games to achieve its desired result; in no way has it accorded the parties an impartial review of the properly presented points of error. According to the jury, two Texans are dead as a consequence of a manufacturer's failure to warn; according to the majority, a little more Texas consumer product safety law is now dead, too, as our right to trial by jury ebbs away.[17]

(13) The majority engages in pure legal fiction to rewrite section 101.021 of the Tort Claims Act to reach the result it desires.

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[15] *Id.* at 379.

[16] *General Motors Corp. v. Saenz*, 873 S.W.2d 353, 362 (Tex. 1993) (Gammage, J., dissenting, joined by Doggett, J.) (citations omitted).

[17] *Id.* at 366-67.

En route, the majority fails to recognize or distorts the application of our decisions in [citations omitted].[18]

(14) Today, however, the majority strips Doris Dodd of her constitutionally-protected rights and allows Texas school districts to arbitrarily refuse to renew school nurses' contracts without any notice or hearings at all.[19]

(15) The concurring opinion by Justice Gonzalez disingenuously asserts that this dissent, rather than the majority, would have the Court, "re-write statutes under the guise of interpreting them."[20]

(16) To the majority, this undisputed failure to make safe the premises and thereby prevent serious harm to an older Texan is just not important enough to merit the use of a deterrent afforded by a long established legal remedy.[21]

(17) By disregarding very real evidence presented in this particular case, the majority has replaced the jury's right to enforce a community standard with its own standard of permissiveness. Consistent with

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[18] *University of Tex. Med. Branch v. York*, 871 S.W.2d 175, 179-80 (Tex. 1994) (Gammage, J., dissenting, joined by Doggett and Spector, JJ.).

[19] *Dodd v. Meno*, 870 S.W.2d 4, 7 (Tex. 1994) (Spector, J., dissenting, joined by Hightower, Doggett, and Gammage, JJ.).

[20] *Id.* at 8 n. 1.

[21] *Wal-Mart Stores, Inc. v. Alexander*, 868 S.W.2d 322, 332 (Tex. 1993) (Doggett, J., dissenting, joined by Gammage and Spector, JJ.).

its increasing disfavor of decision-making by ordinary citizens composed as a jury, the majority essentially reconstitutes itself as a super-jury in Austin.[22]

(18) But with the jury's voice for the community unjustly squelched, the covenants of the public contract for the public good will no longer be enforced by the public.[23]

(19) When an unequivocal constitutional command and concern for the insurance industry collide in this Court, the outcome is no longer in doubt.[24]

(20) When disagreeing with a jury verdict – particularly a jury verdict adverse to an insurance company – the majority increasingly substitutes its own preferences in place of the deliberations of a constitutionally impaneled jury composed of twelve members of the local community. Today's opinion continues this steady erosion of our right to trial by jury.[25]

(21) In truth, it is our Texas Constitution that the majority, through its covert factual sufficiency review, has pronounced irrelevant.[26]

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[22] *Id.* at 336.

[23] *Id.*

[24] *Lyons v. The Millers Cas. Ins. Co.*, 866 S.W.2d 597, 602 (Tex. 1993) (Doggett, J., dissenting, joined by Hightower and Gammage, JJ.).

[25] *Id.* at 605.

[26] *Id.* at 605-606.

(22) Had the judgment been for the claimant because of the insurer's discovery abuse, not only would an oral hearing have been required, but the trial court's detailing of specific factual findings justifying the judgment would have been well advised, and de novo review by this Court of every detail of the trial court's order would have been assured.[27]

(23) I fear that the Court is signaling that at least in the area of discovery, mandamus will issue whenever this Court disagrees with a lower court's decision.[28]

(24) Stymied by the Constitution, the Court cannot decree the result it rather plainly wants to see in this case. To accomplish the desired end, the Court must keep reversing the judgment of the Court of Appeals until it reaches a result that the Court approves. Always the ground for reversal is that the appeals court either cannot or will not follow the law. For this Court to hold that an appeals court has not conducted its factual insufficiency analysis in a lawful manner, simply to coerce that court into changing its conclusion, is to usurp the constitutional

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[27] *Adamo v. State Farm Lloyds Co.*, 864 S.W.2d 491 (Tex. 1993) (Doggett, J., dissenting on denial of application for writ of error) (citations omitted).

[28] *Loftin v. Martin*, 776 S.W.2d 145, 152 (Tex. 1989) (Hecht, J., dissenting, joined by Phillips. C.J., Gonzalez, and Cook, JJ.).

prerogative of the court of appeals. That is what I believe is happening in this case.[29]

(25) The Court's stated basis for its reversal is diaphanous, and its real reason apparent: the Court simply does to agree with the appeals court's result. The Court may not agree with the constitutional delegation of the exclusive power to review the factual sufficiency of evidence to the court of appeals; indeed, I suspect rather strongly that it does not. But surely the Court is constrained to follow the constitution, and it should not attempt to circumvent this disfavored provision by accusing the appeals court of failing to perform its legal duty.[30]

(26) In essence, the Court holds that juries in FELA cases must not be told what the law is lest they become confused and find for the wrong party. I do believe the Court has achieved a new level in result-oriented decision making.[31]

(27) Surely this is a most remarkable result. The jury must decide what the railroad knew or should have known, the Court states, but the jury must not be told that they must decide the issue or they will become confused. To be absolutely sure

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[29] *Lofton v. Texas Brine Corp.*, 777 S.W.2d 384 (Tex. 1989) (Hecht, J., dissenting, joined by Phillips. C.J., and Cook, J.).

[30] *Id.* at 388.

[31] *Mitchell v. Missouri-Kansas-Texas R.R. Co.*, 786 S.W.2d 659 (Tex. 1990) (Hecht, J., dissenting, joined by Gonzalez, Cook, and Hightower, JJ.).

that the jury will not become confused, just do not breathe a word to them about what the law is. It is acceptable to say in Supreme Court opinions that a railroad is not an insurer of the workplace, but don't tell the jury. If they heard such an instruction, they might actually believe it and find for the railroad. One cannot be too sure.[32]

(28) In their zeal to implement their own preferred social policy that Texas corporations not be held responsible at home for harm caused abroad, these dissenters refuse to be restrained by either express statutory language or the compelling precedent, previously approved by this very court, holding that forum non conveniens does not apply in Texas. To accomplish the desired social engineering, they must invoke yet another legal fiction with a fancy name to shield alleged wrongdoers, the so-called doctrine of forum non conveniens. The refusal of a Texas corporation to confront a Texas judge and jury is to be labeled "inconvenient" when what is really involved is not convenience but connivance to avoid corporate accountability.[33]

(29) I do agree with Justice Gonzalez that "sweeping implementations of social welfare policy" are sought here – not by my

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[32] *Id.* at 664.

[33] *Dow Chemical Co. v. Alfaro*, 786 S.W.2d 674, 680 (Tex. 1990) (Doggett, J. concurring).

concurrence but in the unswerving determination of the dissenters to protect the welfare of multinational corporations.[34]

(30) Because the "doctrine" they advocate has nothing to do with fairness and convenience and everything to do with immunizing multinational corporations from accountability for their alleged torts causing injury abroad, I write separately.[35]

(31) It is clear that if anybody is trying to advance a particular social policy, it is Justice Doggett.[36]

(32) I can understand the desire to do equity, but the court's decision today is too one-sided to fall under the rubric of equity. If the court is determined to reach this result, it ought to at least be candid about its reasons.[37]

(33) For every judicial thumb on one side of the scales of justice, the litigant on the opposing scale receives less than his or her due. But out of concern for the plaintiffs' supposed inability to prove their case because of the record before us, the Court has effectively placed the burden of proof on the defendant to negate the cause in

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[34] *Id.* at 680 (Doggett, J., concurring).

[35] *Id.*

[36] *Id.* at 697 (Gonzalez, J., dissenting).

[37] *Williams v. Glash*, 789 S.W.2d 261, 266 (Tex. 1990) (Spears, J., dissenting, joined by Cook and Hecht, JJ.).

fact element of proximate cause, an essential element of plaintiffs' cause of action, thus reversing the burden of proof.[38]

(34) But sympathy is an insufficient and ultimately inequitable ground for statutory construction.[39]

(35) Perhaps this is good policy and precisely what the Legislature intended, although the Court does not seem to think so, since it tries to avoid this result. [. . . wrenching one part of a writing from its context often leaves other parts sharp and twisted, their meaning misshapen. The damage done may be irreparable. It is here, I think, and accordingly, I dissent.[40]

(36) From the unseemly chauvinism of *Davenport* to the blatantly partisan factual recitation of today's plurality opinion, it would appear that some see our Texas Constitution as little more than "a handy grab bag filled with a bevy of clauses that may be exploited" to achieve "some particular social goal." (citation omitted). If I have authored an "expansive writing . . . to dissent from each and every underpinning of" *Davenport*, (citation omitted), it is only because that opinion is so perforated with error, constructs so flawed a foundation

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[38] *Havner v. E-Z Mart Stores, Inc.*, 825 S.W.2d 456, 462 (Tex. 1992) (Cornyn, J., dissenting, joined by Hecht, J.)

[39] *Odle v. City of Denison*, 833 S.W.2d 935, 940 (Tex. 1992) (Phillips, C.J. dissenting, joined by Gonzalez, Hecht and Cornyn JJ.).

[40] *Id.* at 941-42 (Hecht, J. dissenting).

for methodological framework for future decisions.[41]

(37) Its willingness to stretch the rules of appellate procedure to accomplish a desired result in this case, irrespective of the significant consequences to other cases, is less defensible. [. . .] Rulemaking by opinion is not a wise course, to the extent it is even authorized. [. . .] Rulemaking to achieve desirable results in particular cases is even less advisable.[42]

(38) Announced today is an easily manipulable "friends in, foes out" rule to prevent further actions by those who organize to protect taxpayers, consumers or the environment.[43]

(39) The majority ensures that those who pollute will be brought to justice very slowly or not at all.[44]

(40) For today the majority extends a standing invitation to those who would harm our environment to act without fear of citizen challenge in the Texas courts. [. . .] Today the environment is the immediate victim. Those who pollute our rivers, release

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[41] *Ex parte Tucci*, 859 S.W.2d 1, 121 (Tex. 1993) (Phillips, C.J., concurring, joined by Cornyn, J.).

[42] *Piotrowski v. Minns*, 873 S.W.2d 368, 371, 373 (Tex. 1993) (Hecht, J., dissenting, joined by Cornyn and Enoch, JJ.).

[43] *Texas Ass'n of Business v. Texas Air Control Board*, 852 S.W.2d 440, 443 (Tex. 1993) (Doggett, J., dissenting, joined in part by Spector and Gammage, JJ.).

[44] *Id.* at 458.

toxins into our air, and damage our land cannot be promptly penalized.[45]

b. Members of This Court Frequently Refer to Its Failure to Follow Existing Case Law

(1) Although the evidence addressed here is quite similar to that upheld as legally sufficient in *Yowell* it will not suffice for this majority.[46]

(2) For our broader jurisprudence, it means that the majority continues a disturbing trend of reversing the prior rulings of this Court through mischaracterization and weakening the right to trial by jury.[47]

(3) Today's opinion rewrites the product safety law of Texas to deny protection to those who have "only an eighth grade education," by assuming that such people would "not pay attention to warning labels."[48]

(4) This significant change in our law is not addressed solely to workers in a pipe factory, but extends to all of the more than one million adult Texans with less than a ninth grade education.[49]

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[45] *Id.* 476.

[46] *C&H Nationwide*, 903 S.W.2d at 333.

[47] *Id.* at 333-34.

[48] *Dresser*, 880 S.W.2d at 755.

[49] *Id.*

(5) However, the decision announced today remains wrong now for the other reasons it was wrong before, specifically the same "sweeping anti-consumer alteration of our long-standing method for interpreting insurance policies.[50]

(6) Rejecting all of this, the majority adjusts long-standing Texas law to benefit the insurer to the considerable detriment of the truck driver.[51]

(7) Dismissing this law as mere "tradition," the majority asserts, without citation to any authority, that this Court has not only the authority but the duty to make determinations as to the "basis an insurance company may have had for denying a claim[]."[52]

(8) It would be far more honest for the majority to state openly that it is overruling *Salcedo* – not because that decision's statutory construction and analysis were wrong, or because the legislature failed to acquiesce in it, but because the majority dislikes the result.[53]

(9) The majority engages in the use of legal fiction to construe the language of this statute away – to say that it does not say something it does say – to modify its clear

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[50] *Forbau v. AEtna Life Ins. Co.*, 876 S.W.2d 132 (Tex. 1994) (Doggett, J., dissenting, joined by Hightower and Gammage, JJ.).

[51] *Dominguez*, 873 S.W.2d at 377.

[52] *Id.*

[53] *York*, 871 S.W.2d at 180.

and unambiguous terms. The majority works this smoke-and-mirrors sleight-of-hand by rationalizing that it is not the physical file that counts, but the "mental" informational content, which it concludes is not "tangible."[54]

(10) To say that the utility of that file is not the substantive object of the statute is absurd. This court will henceforth inflict injustice on the citizens of our state meant to be protected by the Tort Claims Act, without regard to the established purpose and meaning of section 101.021.[55]

(11) Today's opinion is but one example of the court's recent indifference to precedent and its commitment to wholesale revision of Texas law.[56]

(12) This seemingly innocuous pronouncement is a device by which this Court can circumvent the Constitution to consider the credibility and weight of the evidence, something known until now only by its true name – a factual sufficiency review.[57]

(13) Substituting its new relevancy analysis for this previously well-established law, the majority arbitrarily and without any explanation declares that evidence Lyons

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[54] *Id.*

[55] *Id.*

[56] *Lyons*, 866 S.W.2d at 602 n.1.

[57] *Id.* at 602.

offers to show bad faith is only evidence of coverage.[58]

(14) Perhaps it will adopt the Court's extensive, and unauthorized, analysis as its own, quoting it at length. Perhaps it will patiently follow every directive the Court has given, however unfair and unreasonable it may seem.[59]

(15) Under the guise of statutory construction, the court today abolishes the doctrine of forum non conveniens in suits brought pursuant to section 71.031 of the Civil Practice and Remedies Code.[60]

(16) Our dilemma is to resolve these competing interests, and we ought to do so openly rather than hiding behind the facade of mutual mistake. [. . .] Finally, almost as a afterthought, the court looks to Texas precedent.[61]

(17) *Johnson* is the sole case upon which the Court relies for its holding, as if legislative disapproval were simply inconsequential.[62]

(18) The Court's statutory construction is hardly reasonable, let alone unambiguous. The Court's improbable view also creates

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[58] *Id.* at 603.

[59] *Lofton*, 777 S.W.2d at 389.

[60] *Dow Chemical Co.*, 786 S.W.2d at 690 (Gonzalez, J. dissenting).

[61] *Williams*, 789 S.W.2d at 265-66.

[62] *Martinez v. Second Injury Fund*, 789 S.W.2d 267, 276 (Tex. 1990) (Hecht, J., dissenting).

> a conflict in the language of the former statute. [. . .] I think it indicative of the weakness in the Court's position that it distorts the case law interpreting the statutory provisions in issue.[63]
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> (19) Today, the Court ignores this amendment and in effect holds that a fact finder can look to cohabitation and holding-out as circumstantial evidence of an agreement to be married. This approach is identical to the process of inferences that the legislature repealed. [. . .] Both the *Russell* court and this Court ignore the intent of the legislature in amending the statute. [. . .] To suggest, as the Court does today, that the legislature meant that proof of cohabitation and holding-out no longer gives rise to an inference of an agreement to be married, but now is circumstantial evidence of that agreement, flies in the face of reason.[64]
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> (20) The Court cannot, of course, find a single case which reaches this result in anything like the present circumstances. The reason for this, it seems to me, is that the Court's view is exactly the apposite of what the law should be. [. . .] The Court is determined to avoid the principal issue in the case.[65]

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[63] *Tijerina v. City of Tyler*, 846 S.W.2d 825, 829-31 (Tex. 1992) (Hecht, J., dissenting, joined by Cornyn, J.).

[64] *Russell v. Russell*, 865 S.W.2d 929, 934-36 (Tex. 1993) (Gonzalez, J., dissenting, joined by Hecht, J.).

[65] *Goodyear Tire & Rubber Co. v. Portilla*, 870 S.W.2d 47, 52, 54 (Tex. 1994) (Hecht, J., dissenting).

(21) I seriously doubted whether the Court meant what it said in *Davenport*. Today's decision is proof it did not.[66]

(22) Today precedent and tradition have been trampled as the majority's long-standing fear of ordinary people in our legal system has taken firmly hold.[67]

(23) Nor is the majority restrained by Texas decisional law validating similar requirements.[68]

c. Members of This Court Frequently Refer to the Excessive Time on Appeal Many Cases Pend.

(1) While I do not quarrel with the power of four members of the Court to grant any application or motion for rehearing they deem worthy, I do object to the unconscionable delay in doing so in these two cases.[69]

(2) The delay in these two cases cannot be justified.[70]

(3) The litigants and the people of this State have every right to expect and demand

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[66] *Tilton v. Marshall*, 925 S.W.2d 672, 694 (Tex. 1996) (Gonzalez, J., concurring in part and dissenting in part).

[67] *Texas Ass'n of Business*, 852 S.W.2d at 453.

[68] *Id.* at 457.

[69] *State Farm Fire & Casualty Co. v. Simmons*, 40 Tex. Sup. Ct. J. 791, 930 (July 10, 1997) (Cornyn, J., dissenting on granting of motion for rehearing, joined by Spector, Baker, and Abbott, JJ.).

[70] *Id.*

that this Court perform its duties in a timely manner.[71]

(4) What happened to Sheila Twyman in this case involves grossly offensive conduct which warrants judicial relief and the length of time it took this Court to decide this case is regrettable.[72]

(5) Over five years ago, a trial court issued a divorce decree that included an award to Sheila Twyman of $15,000 for the years of abuse she had suffered at the hands of her husband. AT the time, the award was consistent with prevailing Texas law. Today, the plurality sets aside the trial court's award and sends Sheila Twyman back to start the process over in a new trial. Because justice for Sheila Twyman has been both delayed and denied, I dissent.[73]

(6) The delay in announcing the majority's opinion has been totally unnecessary and unjustified.[74]

(7) A dilatory resolution of the issue presented not only disserves the litigants before us, but also breaches the public's

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[71] *Id.*

[72] *Twyman v. Twyman*, 855 S.W.2d 619, 626 (Tex. 1993) (Gonzalez, J., concurring).

[73] *Id.* at 626 (Spector, J., dissenting, joined by Phillips, C.J. and Hecht, J.).

[74] *Delaney v. University of Houston*, 835 S.W.2d 56, 61 (Tex. 1992) (Doggett, J., dissenting, joined by Mauzy, J.)

trust in performing the duties of the judiciary in a timely and responsible manner.[75]

(8) When the "traditions" of this Court cannot produce expeditious and fair resolution of litigation, they must be changed.[76]

(9) Everyone would be better served by fewer excuses and more leadership in getting the important work of this court accomplished.[77]

(10) Indeed, they conveniently disregard another Code requirement that "[a] judge should dispose promptly of the business of the court." [. . .] Like the majority's recent delay in another case, "justice delayed [has been] justice denied."[78]

(11) To the extent that this case is about standing, it is about standing still[.][79]

(12) The wheels of justice grind slowly, with final resolution often years in reaching. Indeed, in this court they sometimes grind hardly at all. Clearly those willing to profit from polluting our natural resources will not hesitate to employ the delays in the judicial system to their advantage.[80]

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[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.* at 61-62.

[79] *Texas Ass'n of Business*, 852 S.W.2d at 476.

[80] *Id.* 456.

d. Members of This Court Frequently use Negative Metaphor to Describe the Court and Its Actions.

(1) In a strange quirk, contrary to this heritage, the court has concluded that our Texas Constitution mandates Texas taxpayers to subsidize a Swiss corporation.[81]

(2) A distinguished, or rather, a noted ex-judge of this state, a short time ago declared that, "None but fools and poor men ever pay taxes in Texas," and the records at the Comptroller's Office appear to prove the truth of the assertion.[82]

(3) Our constitutions are made and governments are instituted for the benefit and protection of the people and not to foster monopolies and fatten corporations.[83]

(4) In again rejecting Amy's plea for relief, the majority leaves all Texans without the security that should be at the very core of health insurance.[84]

(5) Today's opinion and the insurance company's investigation, which forms the basis for this bad faith claim, share much in common – both are perfunctory and both mislead through omission.[85]

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[81] *HL Farm Corp. v. Self*, 877 S.W.2d 288, 293 (Tex. 1994) (Doggett, J., dissenting).

[82] *Id.* 295.

[83] *Id.* 297 n.6.

[84] *Forbau*, 876 S.W.2d at 132.

[85] *Dominguez*, 873 S.W.2d at 377.

(6) The majority today continues its practice of wearing blinders when evaluating facts not helpful to insurance companies while violating the constitutional mandate that review by this Court is limited to legal, not factual, sufficiency. Once again, as in *Boyles v. Kerr*, [. . .], "excessive concern for the effect of every opinion on insurance companies seems to have become the predominant and overriding" concern of this majority.[86]

(7) Today's writing represents the next step in the dismemberment of Texas consumer product safety law. Having so recently declared that certain previous guarantees of that law are available neither to those Texans with limited education nor to those who labor under hot, sweaty working conditions, the majority now eliminates a safeguard for another class of our citizens. No longer will our law offer comprehensive protection to a consumer provided an inadequate warning of product limitations. And, since, even this abrupt change is not enough to assure General Motors' victory, the majority must also resolve an issue never even raised in this Court.[87]

(8) Instead, today's opinion only attacks its own self-created silly strawman – the unrealistic best and brightest warning – and simplistically announces that one cannot presume that a person would have

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[86] *Id.* at 379 (citation omitted).

[87] *Saenz*, 873 S.W.2d at 362.

heeded a better warning, when, in fact, he paid no attention to the warning given.[88]

(9) I would not so callously disregard our prior rulings in favor of decision-making by cliché.[89]

(10) Equally bizarre is the way today's opinion addresses a product manufacturer's duty.[90]

(11) And so the majority once again pens more answers than the parties have proper questions.[91]

(12) I strongly object to this roughshod treatment of one whose role is vital to public education.[92]

(13) Instead of reasoned discussion, the majority applies a catchword.[93]

(14) Such use of the term "extreme" merely provides another elastic device of an appellate court to sweep away any evidence inconsistent with the result it wants.[94]

(15) Note 4 merely represents the method contrived for this particular case to vaporize

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[88] *Id.*

[89] *Id.* at 363.

[90] *Id.* at 366.

[91] *Id.*

[92] *Dodd*, 870 S.W.2d at 9.

[93] *Wal-Mart*, 868 S.W.2d at 334.

[94] *Id.*

the live testimony of three Texans in order to justify a preconceived result.[95]

(16) Mail order justice – the kind that comes with a stamp and no opportunity to be heard – could and should have been discouraged by this Court.[96]

(17) Today the Court issues mandamus to correct a ruling the trial court never made on an objection to discovery which relator, the discovering party, never opposed. To this unprecedented, unworkable and unreasonable result, I dissent.[97]

(18) Before now, I was aware of no procedure by which the Court could unilaterally change the parties in a case to suit itself, without motion or argument by any party.[98]

(19) It is the height of deception to suggest that docket backlogs in our state's urban centers are caused by so-called "foreign litigation."[99]

(20) Like turn-of-the-century wildcatters, the plaintiffs in this case searched all across the nation for a place to make their claims. [. . .] Their efforts are finally rewarded.

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[95] *Lyons*, 866 S.W.2d at 604.

[96] *Adamo*, 864 S.W.2d at 491.

[97] *Loftin*, 776 S.W.2d at 148.

[98] *Id.* at 149.

[99] *Dow Chemical Co.*, 786 S.W.2d at 686 (Doggett, J., concurring).

Today they hit pay dirt in Texas. No reason exists, in law or in policy, to support their presence in this state.[100]

(21) The benefit to the plaintiffs in suing in Texas should be obvious: more money, as counsel was candid enough to admit in oral argument.[101]

(22) What advantage for Texas does the Court see, or what advantage does it think the Legislature envisioned, that no other jurisdiction has seen, in abolishing the rule of forum non conveniens for personal injury and death cases? Who gains? A few lawyers, obviously. But who else? If the Court has good answers to these questions, why does it not say so in its opinion? If there are no good answers, then what the Court does today is very pernicious for the state.[102]

(23) The Court cannot point to a shred of evidence which, by itself, implies that John Culpepper was the alter ego of Culpepper Properties. Instead, it takes various bits and pieces of evidence, each of which is no evidence of alter ego, adds them together, notes that Mancorp thought John Culpepper might be Culpepper Properties' alter ego, and comes up with evidence of alter ego. Nothing plus nothing plus nothing is still nothing, no matter how hard you believe, or hope, that it may

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[100] *Id.* at 697 (Cook, J., dissenting).

[101] *Id.* at 706 (Hecht, J., dissenting).

[102] *Id.* at 707.

> be something. [. . .] Several smoldering sticks, no one of them flaming, may together build a fire. But all the sticks there are, piled up without spark or heat, make neither smoke nor fire; they are nothing but a big pile of sticks, and one cannot infer from the pile that they must be afire.[103]

(24) By suggesting that the solecism, "his self", implies that John Culpepper and Culpepper Properties are one and the same, the Court shows how far it is willing to grope for evidence of alter ego.[104]

(25) This misapplication of public funds is required, according to the Court, because the Legislature clearly intended for taxpayers to pay public employees for not working. This is nonsense.[105]

(26) To the extent they are important in our analysis, they do not, on balance, support the Court's position, and its claim to the contrary is demonstrably false. Finally, the Court dismisses the argument that its view is absurd as being nothing more than a disagreement over the policy chosen by the Legislature. This, too, is merely rhetorical sleight. [. . .] The Court misstates the issue because it cannot understand this

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[103] *Mancorp, Inc. v. Culpepper*, 802 S.W.2d 226, 231, 234-35 (Tex. 1990) Hecht, J., dissenting, joined by Phillips, C.J.).

[104] *Id.* at 233.

[105] *Tijerina*, 846 S.W.2d at 829.

distinction or because it is afraid of the weakness of its position.[106]

(27) While requiring a mere nine paragraphs to explain his own rationale for agreeing with the judgment entered today, Chief Justice Phillips writes at length about a guarantee of the Texas Constitution that he then chooses to ignore completely, since he is personally unable "to articulate its meaning with confidence."[107]

(28) But Chief Justice Phillips will have none of this. [. . .] So devoid of historical support is Chief Justice Phillips that he must cite to an article whose very title contradicts his opinion and speaks to what is special about this state – Rampant Individualism in the Republic of Texas. [. . .] He prefers to denigrate the work of the Texas drafters of that same era on the unusual grounds that they must have considered the constitutional experience of others and because the strong language they chose in 1836 did to attract the enthusiasm of one historian a century later.[108]

(29) Interestingly, Chief Justice Phillips' primary expert on our state's history of freedom of expression is the occupying Union General during Reconstruction, who advances the quite preposterous claim that such freedom "had never existed in Texas

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[106] *Id.* at 831.

[107] *Ex parte Tucci*, 859 S.W.2d at 27 (Response of Court to concurrence of Phillips, C.J.).

[108] *Id.* at 32-33.

(citation omitted)." [. . .] The consternation expressed in today's concurrence is hardly limited to *Davenport*; what really seems to upset Chief Justice Phillips is a decade of our important related jurisprudence. [. . .] Typical of the concurrence's misuse of authority, this phrase is pulled from (citation omitted).[109]

(30) Unlike the plurality opinion, however, I do try to explain the rationale for my differences.[110]

(31) The solution wrought by the Court today must certainly leave the parties and the trial court slack-jawed. [. . .] In the process, they ignore the Court's role as arbiter and run roughshod over other vital rights.[111]

(32) The Texas tort of bad faith is – to borrow Judge Alex Kozinski's observation in a related context – "so nebulous in outline and so unpredictable in application that it more resembles a brick thrown from a third story window than a rule of law." (citations omitted). The only flaw in Judge Kozinski's metaphor is the implication that bad faith liability is limited to hapless passersby. A more accurate comparison

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[109] *Id.* 41, 43-44, 50, n. 43.

[110] *Id.* at 60, n.5 (Phillips, C.J., concurring, joined by Cornyn, J.).

[111] *Tilton*, 925 S.W.2d at 695-96 (Enoch, J., concurring in part and dissenting in part, joined by Hecht and Gonzalez, JJ.).

would be to an assault weapon fired into a crowd at random.[112]

(33) For plaintiffs, bad faith is more like Hollywood television's Wheel of Fortune, or closer to home, like the Texas lottery: it costs almost nothing to play, you can play whenever you want, and if you win you hit the jackpot – tens, maybe hundreds, of thousands of dollars for the awful mental anguish that invariably seems to accompany denial of even the smallest insurance claim, and millions in punitive damages.[113]

(34) Why is the threat viable in every case filed? Because this Court will not define the limits of the tort. [. . .] This conflict should be resolved, instead, the Court adds to the confusion. [. . .] The Court's rationalizations are approaching doublespeak. [. . .] [B]ut I would have preferred to derive that right from established principles of contract law, or to have relied on statutory remedies, rather than to create a new tort and, like Dr. Frankenstein, take our chances. [. . .] The bad faith tort in Texas does not meet this standard, and it is the Court's fault.[114]

(35) The arbitrariness in this case is not in the insurer's conduct but in the cause of

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[112] *State Farm Lloyds v. Nicolau*, 951 S.W.2d 444, 453 (Tex. 1997) (Hecht, J., dissenting, joined by Phillips, C.J. in all but Part I, Gonzalez and Owen, JJ.).

[113] *Id.*

[114] *Id.* at 454.

action. Our opinions today demonstrate that bad faith liability is as unpredictable as injury from a brick thrown out of a window or a gun fired into a crowd.[115]

(36) Today's opinion delivers a double whammy to protection of our natural resources.[116]

(37) Texans understand the directive "Don't Mess With Texas"; the majority does not. If the mess is big enough, if the stench is strong enough, no matter how great the danger to public health and safety, an industrial litterer can "mess" with Texas without fear of immediate punishment or legally effective citizen action.

(38) The mess in Texas is not only with our environment but with the misinterpretation of the law.[117]

3. The Court Has Rewarded – Not Punished – Other Lawyers for Similar Language.

Conduct such as that at issue here has not been punished by this court. Indeed, often the Court has rewarded such conduct. Respondents' Counsel ask the Court to take judicial notice of its file in *Manges v. Guerra*, 673 S.W.2d 180 (Tex. 1984) (op. on reh'g) (Cause No. C-0771). In the *Manges* case, attorneys for the Guerra family filed, among other things, a motion for rehearing

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[115] *Id.* at 463-64.

[116] *Texas Ass'n of Business*, 852 S.W.2d at 453.

[117] *Id.* at 476.

and three motions to recuse sitting Justices Kilgarlin, Ray, and Robertson. All of these motions raised issues of bias and result-orientation arising from political favoritism and campaign contribution. In the Guerra's motion for rehearing, the Guerra's counsel included as a point of error on rehearing. "The court erred by denying Respondents a fair trial in this court and by depriving Respondents of a fair trial by a jury in the trial court, and thus has denied Respondents constitutional due process." (Guerra motion for rehearing at 3.) Counsel for the Guerra family then opened his argument as follows:

> Five justices of this State's highest court, however honest in their daily conduct as men and judges, are deliberately permitting a litigant who is convicted of fraud by a jury of his peers in his own bailiwick to walk away with his loot of millions while throwing a bone to those he has defrauded. [. . .] If this Court thinks for one moment that by reforming the Manges-to-Manges lease it has restored to Respondents their share of all of the ill-gotten gains of their self-dealing leasing agent, it is living in a fantasy world concerning the profitable use to which the holder can by assignment put the lease the Court has validated. [. . .] [T]he Court has invented a new standard of conduct between the executive and the mineral owner which rescues Manges from a situation of his own making by his greed and self-dealing. [. . .] The concern the five justices feel is for an agent who has been convicted by a jury of defrauding his principals into contracting with him in the first instance and thereafter visiting upon them five different acts of "malicious and wanton" conduct in "willful and unconscionable

> disregard of their rights and interests," all noticeably unmentioned in the Court's opinion. That concern is hardly understandable by his victims. Neither is it in keeping with the Court's long tradition of protecting the victims of abused trust and confidence.

(Guerra motion for rehearing at 4, 5, and 6.)

As opposed to Kelly, who has lost on rehearing, the rhetoric of the Guerra family's motion for rehearing resulted in a complete turnaround by the Court in their favor. *See Manges v. Guerra*, 673 S.W.2d at 180. And, unlike Respondents' Counsel, who today stand accused of contempt, the Guerra family's counsel long have been esteemed as having pressed their position on rehearing and caused a watershed change in the Court's history.

Even in more recent cases of bitter invective, the Court prudently has chosen not to penalize an attorney's exercise of his First Amendment rights. Again, Respondents' Counsel ask the Court to take judicial notice of its own files, this time general correspondence. Earlier this year, Dallas Attorney Michael W. Shore wrote the Court regarding its decision in *Saint Luke's Episcopal Hospital v. Agbor*, 952 S.W.2d 503 (Tex. 1997). In his letter, Mr. Shore wrote:

> For the past four (4) years the Court seems to have been intent on making it more difficult for normal people to obtain compensation for their injuries from doctors, lawyers, insurance companies and products manufacturers. [. . .] To call *Agbor* unprincipled is a vast understatement. To call it another in a series of Texas Hospital Association *political* favors is probably more accurate. Some of you may be pocketing

> the big business contributions and rationalizing your actions by telling yourselves that you are only "swinging the pendulum back to the middle." However, by legislating for business and professional interests from the bench the way prior courts backed by trial lawyers legislated for the consumer does not make either Court look as it should – impartial.

(*See* Michael W. Shore letter to Court (dated July 7, 1993)). Respondents' Counsel understand from Mr. Shore that this Court has taken no action – contempt or grievance – against him to date. Yet, his submission to the Court was not even in connection with any client representation and he was under no duty to act as a zealous advocate.

Penalizing Respondents' Counsel for the same conduct as other attorneys who are not penalized violates their First, Fifth, Sixth, and Fourteenth Amendment rights. Selective prosecution by way of laws that affect an individual's right to free speech constitutes a denial of substantive due process. *See, e.g., Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972), and *Thornhill v. Alabama*, 310 U.S. 88, 95-96 & nn. (1940). This Court has not held in contempt, sanctioned, or referred to the Grievance Committee other attorneys for similar conduct. Respondents' Counsel respectfully submit that it should not do so here.

Truly, Respondents' Counsel believe, in a case as controversial as *Havner*, involving matters of the sufficiency of "novel scientific evidence," – issues upon which Justice Hecht himself has questioned the political motivations of his fellow justices (*Maritime Overseas Corp. v. Ellis*, 40 Tex. Sup. Ct. J. 110, 113-14 (Nov. 15, 1996) (Hecht, J.,

dissenting on denial of application for writ of error) – the Court should not be, as Justice Gonzalez puts it, "trigger happy" to penalize Respondents' Counsel. Rather, given the long history of – not to mention relevancy of – comment on motivation and political bias on the part of the judiciary when creating new law, Respondents' Counsel only have followed in the footsteps of "big firm" attorneys now considered heroes of judicial reform – not to mention the writings of this Court.

4. Texas Law Provides That Only the Signatory Can Be Sanctioned for Language in Pleadings.

"Rule 13 applies only to pleadings, motions and other papers signed by attorneys." *GTE Communications Systems Corp. v. Tanner,* 856 S.W.2d 725, 730 (Tex. 1993) (Hecht, J.). "Rule 13 prescribes that courts presume that papers are filed in good faith. Thus, the burden is on the party moving for sanctions to overcome this presumption." *Id.* Likewise, § 10.001-.006, Tex. Civ. Prac. & Rem. Code, applies only to the signing attorney or party. *See* § B.1., above. Accordingly, the Respondents' Counsel believe that the Court may not sanction neither Mr. Nace nor Ms. Hamilton under Rule 13 or § 10.001.

5. Given the Circumstances Here, the United States and Texas Constitutions Protect Kelly and Her Counsel From Sanctions Based on Their Choice of Language.

"The history of the power to punish for contempt and the unequivocal command of the First Amendment serve as constant reminders that freedom of speech and

of the press should not be impaired through the exercise of that power, unless there is no doubt that the utterances in question are a serious and imminent threat to the administration of justice." *Craig v. Harney*, 331 U.S. 367, 373 (1947) (citations omitted). Any decision by this Court to punish Respondents' Counsel calls into play the protections of the First, Fifth, Sixth, and Fourteenth Amendments of the United States Constitution, as well as the free speech, open courts, and due course of law provisions of the Texas Constitution. *See* U.S. Const. amends. I, V, VI, and XIV, and Tex. Const. art. I, §§ 8, 13, and 19.

As an initial matter, it is important to note *whose* constitutional rights are affected – not merely implicated – by the Court's threatened punishment: first and foremost lie the rights of Kelly Havner. "Most importantly, the rights of litigants may not be infringed by the abusive exercise of this power." *Kutch v. Del Mar College*, 831 S.W.2d 501, 510 (Tex. App. – Corpus Christi 1992, no writ). To the extent that she has been punished for Respondents' Counsels' conduct, Respondents' Counsel urge the Court to again rehear the legal issues and punish Respondents' Counsel only. Respondents' Counsel respectfully submit that this Court *did* create new law and Kelly *should* have a new trial. No language by her attorneys should alter this and, to the extent such may have occurred, her federal First and Sixth Amendment rights have been compromised, as well as her rights under article I of the Texas Constitution.

Kelly prevailed before the Corpus Christi Court of Appeals because of an emotional and vehement motion not unlike the one at issue here. That Court rewarded her efforts to catch their attention with a complete rev[illegible]rsal of

position in her favor. If this Court should decide to punish Kelly and Respondents' Counsel as the Show Cause Order portends, it will chill their efforts to pursue her case further, such as to the United States Supreme Court by, among other things, requiring them to focus their energies on their self-defense when they should be preparing further appellate papers.

Of additional importance are the First, Fifth, Sixth, and Fourteenth Amendment rights of Respondents' Counsel, and the attorneys and litigants throughout Texas with cases on appeal. *See also* Tex. Const. art. I, §§ 8, 13, and 19. Appellate attorneys' efforts will be chilled should the Court sanction or otherwise find Respondents' Counsel in contempt here. This is the most serious implication of the Court's decision. For example, Rebecca E. Hamilton, one of Respondent's Counsel, has shown a copy of pages 8, 14, and 16 of the Second Motion for Rehearing to several local attorneys – all members of the defense bar. (These are the pages to which Ms. Hamilton contributed that the Court notes as being of concern.) Not one could ascertain the language the Court perceives as contemptuous and sanctionable.

Of equal importance, "It is recognized that persons who make derogatory statements about public officials, including judges, are protected by the First and Fourteenth amendments of the United States Constitution from imposition of civil and criminal liability, unless the statement is made with knowledge that it is false or with reckless disregard of whether it is false or not." *State Bar of Texas v. Semaan*, 508 S.W.2d 429, 432 (Tex. Civ. App. – San Antonio 1974, writ ref'd n.r.e.) (citing *New York Times*

Co. v. Sullivan, 376 U.S. 254 (1964), and *Garrison v. Louisiana*, 379 U.S. 64 (1964)). Respondents' Counsel respectfully remind the Court that, "Any bridle upon a free flow of information to the people concerning the performance and qualifications of public officials will have little chance of gaining constitutional approval." *Semaan*, 508 S.W.2d at 432.

C. Neither Mr. Hilliard's Nor Ms. Hamilton's Conduct Is Grievable.

While it appears that this honorable Court can refer any attorney to the Grievance Committee any time it believes it should, Respondents' Counsel urge that it not do so in this case. For one thing, the chilling effect upon attorneys' First Amendment rights again comes into play. For example, among the pages cited by the Show Cause Order as of "particular concern" are pages 8, 14, and 16 of the Second Motion for Rehearing. Yet none of the pages reflects any language that Respondents' Counsel can discern as being in violation of *any* rule.

If attorneys are unable to discern what conduct will result in their referral to the Grievance Committee, their First Amendment rights, as well as their clients' right to zealous advocacy, have been chilled out of fear of punitive attack. Respondents' Counsel ask the Court to consider the former Ethical Consideration, which expressly recognized that "the right of a lawyer as a citizen to publicly criticize adjudicatory officials if motivated by desires to improve the system, and if done in a proper manner." Tex. Gov't Code Ann. art. 10, § 9, EC 8-6 (State Bar Rules [Texas Code of Professional Responsibility])

(Vernon 1988), *repealed* 1990. As the San Antonio Court of Appeals noted, "Such right is particularly meaningful where, as in Texas, the adjudicatory officials are selected through the elective system." *State Bar of Texas v. Semaan*, 508 S.W.2d 429, 432 (Tex. Civ. App. – San Antonio 1974, writ ref'd n.r.e.). Further, as Respondents' Counsel said nothing in the Second Motion for Rehearing that this Court has not said about itself, and caused no disruption of the administration of justice, Respondents' Counsel do not believe it can be said that Counsel acted in an grievable manner.

Respondents' Counsel conclude by quoting Justice Enoch, who has opined:

> It is all the rage to criticize lawyers and attribute denigration of the legal profession to the unscrupulous tactics of the "Rambo" lawyer. What many people, both within and outside the legal community, fail to grasp is that the maladies of the profession are not exclusively, or even primarily, attributed to the zealous advocate. Rather, the lawyer is part of an adversarial system that arms the attorney with various rules which encourage, and sometimes require, the lawyer to use the very tactics that subject the profession to overwhelming criticism. *Furthermore, there is a real tension in a system that places a duty on a lawyer to zealously advocate on behalf of the client while simultaneously observing a duty to the court.*

Craig Enoch, *Incivility in the Legal System? Maybe It's the Rules*, 47 SMU L. Rev. 199, 199-200 (1994) (emphasis added).

D. This Court Should Take No Action Pursuant to Its Show Cause Order Because Both Due Process and Due Course of Law Protections Have Not Been Afforded to Respondents' Counsel.

1. The Court Denied Respondents' Counsel a Hearing.

"[D]ue process and the Sixth Amendment guarantee a defendant charged with contempt such as this 'an opportunity to be heard in his defense – a right to his day in court. . . . " *See Holt v. Virginia*, 381 U.S. 131, 136 (1965) (quoting *In re Oliver*, 333 U.S. 257, 273 (1948)), and *Ex parte Carney*, 903 S.W.2d 345, 346 (Tex. 1995) (*per curiam*) ("Due process of law demands that before a Court can punish for a contempt not committed in its presence, the accused must have full and complete notification of the subject matter, and the show cause order or other means of notification must state when, how and by what means the defendant has been guilty of the alleged contempt.") (quoting *Ex parte Edgerly*, 441 S.W.2d 514, 516 (Tex. 1969)); *see also Ex parte Alloju*, 907 S.W.2d 486, 487 (1995) (*per curiam*) (addressing whether a person may be held in contempt if the sanction imposed is coercive only and not punitive and holding that, regardless of whether coercive or punitive, the accused contemnor must have hearing before the Court). Here, the Court has denied Respondents' Counsel both.

In *Ex parte Chambers*, this Court held that notice and hearing with evidence was necessary in a case of direct, criminal contempt. 898 S.W.2d 257, 259-60 (Tex. 1995). Clearly, then, in a case of indirect, constructive contempt,

based on the "tenor" of an attorney's briefing, notice and an evidentiary hearing are necessary.

2. The Court Has Not Granted Respondents' Counsel a Jury.

Respondents' Counsel believe that they are entitled to a jury to ascertain the truth or reckless disregard, if any, of the Second Motion for Rehearing. *See Holt v. Virginia*, 381 U.S. 131, 136 (1965) (noting that the contemnor was constitutionally deprived by his lack of opportunity to prove the truth or falsity of his charges against the court of bias), and *Ex parte Sproull*, 815 S.W.2d 250 (Tex. 1991) (accused contemnor entitled to a trial by jury under Sixth Amendment if major offense); *see also Ex parte Griffin*, 682 S.W.2d 261 (Tex. 1984) ("The Sixth Amendment to the United States Constitution guarantees the right to jury trials for serious offenses, but not petty offenses.") (quoting *Muñiz v. Hoffman*, 422 U.S. 454, 475-76 (1975)), and *Ex parte Johnson*, 654 S.W.2d 415, 420 (Tex. 1983) ("[P]rocedural safeguards for contempt do not derive from the sixth amendment, but arise under traditional notions of due process.").

In *Ex parte Johnson*, this Court held that, "The right to be present at trial and confront witnesses is fundamental and essential to a fair trial." 654 S.W.2d 415, 421 (Tex. 1983) (quoting *Pointer v. Texas*, 380 U.S. 400, 405 (1965)). It further observed that, "The right is protected under Texas law by article 1, section 10 of the Texas Constitution." *Johnson*, 654 S.W.2d at 421. Respondents' Counsel merely ask for the same rights afforded thousands of Texans each day, who face loss of liberty and property.

3. The Court Declined to Specify What It Finds Objectionable in the Second Motion for Rehearing.

In *Ex parte Carney,* this Court addressed the specificity of a "show cause order that referred to a motion" for "contempt and sanctions" "but provided no additional information to Carney." The motion claimed that contempt and sanctions were warranted because " 'Carney had not forwarded to the Sheriff all the documents and items ordered for turnover; and had failed to appear for his deposition." 903 S.W.2d 345, 346 (Tex. 1995) (*per curiam*). This Court observed that:

> While the turnover order itself was relatively specific, the motion for contempt did not state how Carney had failed to comply with the order other than stating that Carney had not forwarded to the Sheriff all documents and items ordered. The motion for contempt did not give Carney full and complete notice of the subject matter of the motion, and it did not give Carney notice of when and how, and by what means he was guilty of contempt. And, as mentioned above, the court's order to show cause on the motion for contempt did not state what alleged noncompliance would be considered during the hearing."

Id.

"Full and unambiguous notice of the accusation of contempt must be served on the alleged contemnor." *Ex parte Chambers,* 898 S.W.2d 257, 262 (Tex. 1995) (quoting *Ex parte Adell,* 769 S.W.2d 521 (Tex. 1989)). Respondents' Counsel submit that they are entitled to adequate notice, as well.

4. The Court Should Recuse Itself.

This Court should recuse itself as to the grievance issues because, "The Grievance Committee is an administrative agency of the judicial department and is the arm of the Supreme Court in the discharge of its professional policing duties." *State Bar of Texas v. Semaan*, 508 S.W.2d 429, 434 (Tex. Civ. App. – San Antonio 1974, writ ref'd n.r.e.), and *State v. Sewell*, 487 S.W.2d 716, 719 (Tex. 1972). A referral by this Court of Respondents' Counsel to the Grievance Committee is a referral of them to itself. The Court thus should recuse itself and allow another judicial body to make such a decision.

This Court should recuse itself as to the contempt, grievance, and/or sanctions issues because of the factual matters regarding which Respondents' Counsel are entitled to an evidentiary hearing and jury. The Show Cause Order threatens Respondents' Counsels' ability to practice law, to engage in free speech, and already has damaged their good reputations in the legal community. The Court has denied them a hearing. If the Honorable Court reconsiders and allows Respondents' Counsel the fundamental right to adduce evidence in support of the truth, or the lack of reckless disregard thereof, of the language in the Second Motion for Rehearing, another court should sit to hear the evidence. Further, Justice Gonzalez already has spoken about this pending matter to the media, making both factual and opinion statements relevant thereto. (*See* Exhibit 3.)

Accordingly, pursuant to Rules 16.1-.3 of the Texas Rules of Appellate Procedure, Respondents' Counsel move the Court to recuse itself *as a body*. Respondents'

Counsel respectfully refer the Court to Rule 18b(2)(a) and (b), Texas Rules of Civil Procedure. Alternatively, Respondents' Counsel move Justice Gonzalez to recuse himself from any deliberation as to this matter, because of his comments to the media. Respondents' Counsel respectfully refer Justice Gonzalez to Rule 18b(2)(d), Texas Rules of Civil Procedure

5. The Court Should Refer to Another Court the Issue of Whether It Should Be Recused.

Rule 16.3 of the Texas Rules of Appellate Procedure provides:

> Before any further proceeding in the case, the challenged justice or judge must either remove himself or herself from all participation in the case or certify the matter to the entire court, which will decide the motion by a majority of the remaining judges siting *en banc. The challenged justice or judge must not sit with the remainder to consider the motion as to him or her.*

Tex. R. App. P. 16.3(b) (emphasis added). Although the rule does not explicitly envision the procedure applicable when a movant seeks a recusal of an entire court, such motions are not without precedent. *See Hutcherson v. Woodmen of the World,* 112 Tex. 551, 251 S.W. 491 (1923). Clearly, the Court should act as its predecessors and certify the issue of recusal to another court or another judicial body and allow them to resolve the recusal issues.

III.

CONCLUSION

In *Thornhill v. Alabama,* the United States Supreme Court observed that:

> The safeguarding of these rights to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion is essential to free government. Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth. Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion. Abridgement of freedom of speech and of the press, however, impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government.

Respondents' Counsel agree that courtesy and decorum are essential aspects of the practice of law. Respondents' Counsel have the utmost respect for the Texas justice system and the rights for which that system is responsible to protect. Respondents' Counsel also have the utmost respect for the role of attorneys as zealous advocates for those who suffer harm at the hands of others, as Kelly surely did in this case.

Respondents' Counsel dispute, however, whether an attorney can be held in contempt and otherwise sanctioned for word, on paper, filed with a Court that failed to react for nearly half a year. Respondents' Counsel

further dispute that any of the language in the Second Motion for Rehearing was boisterous or disruptive of the administration of justice. Finally, Respondents' Counsel would urge the Court that the sanctity of the First Amendment should not be compromised by what may be perceived as merely hurt feelings.

WHEREFORE, PREMISES CONSIDERED, Respondents' Counsel, Robert C. Hilliard, Barry J. Nace, and Rebecca E. Hamilton, respectfully request that this Court decline to enter an order of contempt or sanctions, that it decline to refer this matter to the Grievance Committee of the State Bar of Texas, and that it take no action penalizing Mr. Barry J. Nace for his participation in representing Kelly Havner. Alternatively, Respondents' Counsel ask for adequate notice of their alleged wrong-doing, and evidentiary hearing at which a jury may decide all factual issues, and that the Court refer the issue of whether it recuse itself to another judicial official, unless it decides at this time to recuse itself as a body.

Respectfully submitted,

WHITE, WHITE & HAMILTON, P.C.

/s/ Todd W. White

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State Bar No. 21332700
Rebecca E. Hamilton
State Bar No. 08837050
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Tel.: 972/771-8011
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ATTORNEYS FOR RESPONDENTS

CERTIFICATE OF SERVICE

I certify that I served a copy of this Response on all interested parties and their counsel. I have not served counsel for Merrell Dow Pharmaceuticals, Inc., as Petitioner did not seek sanctions against counsel for Respondents in connection with the Motion for Rehearing. I served this Motion by United States Mail on this the 4th day of December, 1997.

/s/ Todd W. White
Todd W. White

VIA UNITED STATES MAIL
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VIA UNITED STATES MAIL
Guy H. Allison
THE ALLISON LAW FIRM
920 Leopard Street
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VERIFICATION

STATE OF TEXAS)
)
COUNTY OF ROCKWALL)

On this the 3rd day of December, 1997, Rebecca E. Hamilton appeared before me, the undersigned notary public, and after I administered an oath to her, upon her oath, she said she had read this the Response of Robert C. Hilliard, Barry J. Nace, and Rebecca E. Hamilton to Show Cause Order Dated November 13, 1997 and Motion to Recuse ("Response"), and that the facts pertaining to the Motion to Recuse portion of the Response are within her personal knowledge and are true and correct. Ms. Hamilton further attested that the Exhibits attached to the Response are true and correct copies of the originals.

/s/ Rebecca E. Hamilton
Rebecca E. Hamilton

SWORN TO and SUBSCRIBED before me, the undersigned Notary Public, on the 3rd day of December, 1997, to certify which witness my hand and seal.

(Seal) NANCY SEMPLE
MY COMMISSION
EXPIRES
JUNE 30, 2001

/s/ Nancy Semple
Nancy Semple
Notary Public in and for
the State of Texas
Rockwall County

CAUSE NO. 13-92-00540-CV

**IN THE COURT OF APPEALS
FOR THE THIRTEENTH SUPREME JUDICIAL
DISTRICT CORPUS CHRISTI, TEXAS**

MERRELL DOW PHARMACEUTICALS, INC.,

Appellant

VS.

**ERNEST HAVNER AND MARILYN HAVNER ON
BEHALF OF THEIR MINOR CHILD KELLY HAVNER,**

Appellees

APPELLEES' RESPONSE TO MERRELL'S OPPOSITION TO APPELLEES' MOTION FOR REHEARING AND EN BANC CONSIDERATION

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**ATTORNEYS FOR APPELLEES
ERNEST HAVNER AND MARILYN HAVNER
ON BEHALF OF THEIR MINOR CHILD,
KELLY HAVNER**

DELIVERED APR. 21, 1994

CAUSE NO. 13-92-00540-CV

IN THE COURT OF APPEALS
FOR THE THIRTEENTH SUPREME JUDICIAL DISTRICT
CORPUS CHRISTI, TEXAS

MERRELL DOW PHARMACEUTICALS, INC.,

Appellant

VS.

ERNEST HAVNER AND MARILYN HAVNER ON BEHALF OF THEIR MINOR CHILD KELLY HAVNER,

Appellees

APPELLEES' RESPONSE TO MERRELL'S OPPOSITION TO APPELLEES' MOTION FOR REHEARING AND EN BANC CONSIDERATION

TO THE HONORABLE JUSTICES OF THE COURT OF APPEALS:

Your Chief Justice has signed an Opinion which flatly ignores and frequently misstates the evidence presented by Plaintiffs at the trial level (see Appellees' Motion for Rehearing and Appellees' Motion for En Banc Reconsideration). To assure Merrell Dow enjoyed immunity from the jury's verdict, this Opinion had to first betray the citizens of Texas; Texans, who now have as the law in their State an Opinion that first left the record unread, then allowed pertinent law to remain shelved, and ultimately redefined logic. This Court has voted to throw out a carefully deliberated verdict of the citizens of Nueces county, a verdict which by even the most elementary

reading of the record is supported by the evidence, a verdict which with just a general understanding of the applicable case law demanded affirmation. Remarkably, even the Texas Rules of Evidence could not bridle this runaway Opinion. Instead, this Opinion serenades a company that, for profit, thoughtlessly and without remorse poisoned American mothers and caused their children to live lives with terrible birth defects. In an attempt to support conclusions which seem to echo the champagne toasts of Merrell Dow's boardroom we are confronted with reasoning reflective not of the current law in the area, but only of the current political climate under which our State now finds itself. Clearly, this Opinion exhibits no appellate concern for the law nor the record (see Appellees' Motion for Rehearing and Appellees' Motion for En Banc Reconsideration). Either because of personal experience with Bendectin by someone who had influence in this Opinion or a clear outcome oriented mindset, Kelly Havner and the jury that heard her case, find themselves frustratingly powerless. To flick away the verdict of this jury as if it were of no greater import than lint on the sleeve of a black robe, as if the hard work of these twelve Corpus Christi jurors who faithfully contributed more than a month of their lives to the case because they believed it their duty to do so, sends a clear message to Big Business: Fear neither the law nor the record nor the trial judge nor the jury. Especially have no concern for little blue-eyed Kelly Havner whose body you mutilated while she was still in the one place she should have been safe – her Mother's womb. Big money, higher office and a fondness for the personal attention and flirtations of Merrell Dow's attorney during oral argument have

outweighed the facts, the jury's verdict and even, amazingly, our own United States Supreme Court (see Appellees' Motion for Rehearing and Appellees' Motion for En Banc Reconsideration). Finally, this Opinion is not only a ridiculously thinly veiled microphone for Merrell Dow, but also is responsible for a medical first; it turns a birth defect into a miscarriage.

Respectfully submitted,

HILLIARD, GRILLO
& MUÑOZ, L.L.P.

By: /s/ Robert C. Hilliard
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ATTORNEYS FOR APPELLEES ERNEST HAVNER AND MARILYN HAVNER ON BEHALF OF THEIR MINOR CHILD, KELLY HAVNER

CERTIFICATE OF SERVICE

By my signature below, I hereby certify that a true and correct copy of APPELLEES' RESPONSE TO MERRELL'S OPPOSITION TO APPELLEES' MOTION FOR REHEARING AND EN BANC CONSIDERATION has been provided to all counsel of record listed below, and our jury in the manner specified, on this the 21st day of April, 1994.

/s/ Robert C. Hilliard
Robert C. Hilliard

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12. John Andreas Mourelatos
    525 Texas Ave.
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NO. 95-1036

IN THE SUPREME COURT OF TEXAS

MERRELL DOW PHARMACEUTICALS, INC.,

Petitioner,

V.

ERNEST HAVNER & MARILYN HAVNER ON BEHALF OF THEIR MINOR CHILD KELLY HAVNER,

Respondents,

RESPONDENTS' MOTION TO RECUSE JUSTICE JAMES A. BAKER

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ATTORNEYS FOR RESPONDENTS ERNEST HAVNER AND MARILYN HAVNER ON BEHALF OF THEIR MINOR CHILD,

KELLY HAVNER

NO. 95-1036

IN THE SUPREME COURT OF TEXAS

MERRELL DOW PHARMACEUTICALS, INC.,

Petitioner,

V.

ERNEST HAVNER & MARILYN HAVNER ON BEHALF OF THEIR MINOR CHILD KELLY HAVNER,

Respondents,

Appealed from the Thirteenth Court of Appeals
At Corpus Christi, Texas

RESPONDENTS' MOTION TO RECUSE JUSTICE JAMES A. BAKER

TO THE SUPREME COURT OF TEXAS:

Respondents Ernest Havner and Marilyn Havner, on behalf of their minor child Kelly Havner, under the authority of the United States and Texas Constitutions, Tex.R.Civ.P. 18b, Tex.R.App.P. 15 and 15a, file this motion to recuse Justice James A. Baker from this cause.

1. Respondents ask that Justice Baker be recused from further participating in or voting on this case for the following reasons. On March 26, 1996, only seven days

after oral argument and prior to this Court issuing its opinion, Justice Baker's campaign mailed-out a funds solicitation letter to lawyers across the State. The letter identified Justice Baker's race as being the "toughest – and the most critical" of all the Republicans running for the Supreme Court. Merrell Dow's lawyer, John Hill, fresh from arguing Merrell's case to this Court, signed Justice Baker's request for money. A copy of the letter (redacted as to recipient) is attached as Exhibit 1. The objective facts in support of this motion are that John Hill stood at the podium before Justice Baker, and the rest of this Honorable Court, and firmly insisted on a reversal of the 13th Court of Appeal's affirmation of Kelly Havner's verdict. Within a week, Mr. Hill signed his name to a letter sent to Texas lawyers seeking to collect money to be used to ensure Justice Baker continues to sit on this Court. John Hill's letter, mailed out on Justice Baker's campaign stationery, causes Justice Baker's impartiality to be reasonably questioned in this proceeding. Consequently, under the clear reading of the rules, Justice Baker "shall disqualify or recuse himself". Tex.R.App.P. 15a and Tex.R.Civ.P.18b(2)(a).

2. Kelly Havner now faces an uncomfortable dilemma, one she should never have had to worry about: basic fairness. She now must ask this Court to spend time evaluating the effects of political conduct as it may relate to her case. She makes this request with much caution and deference. It simply cannot be ignored and there is little question that John Hill's letter puts Justice Baker's impartiality in issue. First, obviously Mr. Hill wants Justice Baker to vote in Merrell's favor in this case as it will save his client approximately Eight Million Dollars

($8,000,000.00). Second, and just as obviously, Justice Baker wants to be re-elected and needs money to assist in his endeavor. John Hill is publicly spear-heading Justice Baker's efforts to build a war chest. Mr. Hill, the former Chief Justice of this Court, is using his name in hopes of peddling influence on behalf of Justice Baker. Justice Baker is relying on Mr. Hill to convince lawyers from around the state to "Send Justice James A. Baker your contribution *today*." This is completely different than when Justice Baker's campaign accepted $5,000.00 on December 27, 1995 from Liddell, Sapp, Zivley, Hill & LaBoon's (Mr. Hill is a named partner in Liddell, Sapp, Zivley, Hill & LaBoon) PAC, or when a single lawyer sends a campaign contribution to his Supreme Court candidate of choice. The focus of this motion is a highly organized fund raising effort which must depend and rely on John Hill's permitting the use of his name to insure large sums of contribution money will go to Justice Baker.

3. Justice Baker may not allow John Hill's leverage to sway him in any way. In fact, Respondent's true hope and belief is that Justice Baker, should he remain on this case, would vote fairly and in a way consistent with his own independent sense of learning and experience. However, this is not the issue. The issue is whether Justice Baker's impartiality is now reasonably in question in this proceeding as a result of his campaign's choice in selecting Merrell's attorney, the lawyer of a pending case, to author a written solicitation for money; money which will go directly to Justice Baker's re-election efforts. Justice Baker is currently considering a case that John Hill argued for Merrell; a case which will save Mr. Hill's

clients millions of dollars should Justice Baker and a majority of this Court follow Mr. Hill's direction. A case that will be tremendously significant in all future litigation involving experts. There can be no serious debate that does not lead to the reasoned conclusion that Justice Baker must recuse himself from voting or participating any further in this matter.

4. Merrell Dow's position as presented by John Hill in this case is that a Judge rather than a jury should decide the weight and credibility of expert testimony. This Court now has an example of the dangers created when elected officials, who have to depend on the financial kindness and political influence of the lawyers who appear in front of them, begin to weigh matters meant to be decided in the jury box. One day, an elected State District Judge, facing the same dilemma as Justice Baker, may have to make a subjective decision regarding an expert. Perhaps the lawyer asking the Judge to rule the expert's testimony inadmissible will have also spearheaded that Judge's fund collecting efforts. Judges and Legislators are necessarily exposed to temptations of money, fame, and power to induce them to disregard justice and sell the rights, and violate the liberties of the people. Jurors, on the other hand, are exposed to none of these temptations. A jury, therefore, ensures the first and indispensable requisite in a judicial tribunal, integrity. A level judicial playing field for both sides is fundamental to the notion of non-partisan fairness. Should Justice Baker remain a sitting member of the Court deciding this case, it does damage to the respected reputation of the man himself, to the Court and to the process of Justice.

5. Respondents, counsel, Robert C. Hilliard, first learned of the mail-out on April 8, 1996. This motion was immediately prepared and mailed to this Honorable Court on April 9, 1996. Respondents make this objection at the first opportunity; therefore, good cause exists under Tex.R.App.P. 15(a) and the Court should permit this objection and motion to be filed.

6. For these reasons, Respondents Ernest Havner and Marilyn Havner, on behalf of their minor child Kelly Havner ask that Justice James A. Baker recuse himself from this case. If Justice Baker refuses, Respondents request that the motion be referred to the Court en banc, without Justice Baker, for a ruling.

> *"Justice Baker is also an integral member of the Court's continued movement for reform. He is committed to fully and permanently restoring the integrity of the Court . . . "*
>
> *John L. Hill, Jr.*
> *Campaign to*
> *Elect Justice James A. Baker*
> *For Texas Supreme Court*
> *March 26, 1996*

Respectfully Submitted,

HILLIARD & MUÑOZ, P.L.L.C.

/s/ Robert C. Hilliard
Robert C. Hilliard
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EXHIBIT 1

James A. Baker
(logo) For Texas Supreme Court

March 26, 1996

Dear

Of all the Republicans running for Supreme Court Justice, James Baker's race for Place 2 will be the toughest – and the most critical.

He's being challenged by Democrat Gene Kelley, who we're concerned will benefit from his well-known name. Texans need only remember when Don Yarborough was elected to the Supreme Court because voters mistook him for former United States Senator Ralph W. Yarborough.

Our concern has heightened since the release of the results of recent State and House Bar Association polls. In the 1996 State Bar Association poll, Baker received 9,377 or 81% of the votes cast – the highest percentage received by any of the four incumbent Supreme Court justices on this year's ballot. Kelley received the remaining 19%.

In the 1996 Houston Bar Poll, Baker was rated "qualified" or "well qualified" by 93% of his total, or 1,115 out of 1,199 votes. By contrast, Kelley received more "not qualified" votes – 877 or 91% of his total – than any other candidate for the Supreme Court.

Justice Baker is clearly and widely thought to be the more qualified candidate by the legal community, but we need your help to ensure Gene Kelley's well-known name doesn't overcome Justice Baker's superior qualifications and abilities.

Will you please donate $500 or $250 to Justice James Baker's campaign today? Your contribution is critical to helping us inform Texans of the clear differences between the two candidates. Justice Baker is the only qualified candidate running for Place 2.

James Baker was appointed by Governor George W. Bush to the state's highest court in October, 1995, to fill the vacancy created by the resignation of Justice Bob Gammage. He has 10 years of experience as a Dallas Court of Appeals justice, and 30 years of experience practicing law.

Justice Baker is also an integral member of the Court's continued movement for reform. He is committed to fully and permanently restoring the integrity of the Court, and ensuring its decisions are honest and fair.

Gene Kelley, on the other hand, is rated unqualified by the overwhelming majority of the legal community.

We must get our message out to the voters. We must promote James Baker's qualifications, and the significance this election will have on preserving the Court's integrity. Television ads will be a necessity.

Please, help us support the *only* qualified candidate for Supreme Court Justice, Place 2. Send Justice James A. Baker your contribution *today*.

This race is critical. Although there are unequivocal differences between the two candidates, it will most definitely be the most difficult to win. Gene Kelley's high name recognition poses a significant threat to James Baker and to Republicans, unless we can get our message out to the voters.

Thank you for your consideration.

Sincerely,

/s/ Tom Luce
Tom Luce

/s/ John L. Hill, Jr.
John L. Hill, Jr.

P.S. James Baker's race for Place 2 on the Texas Supreme Court will be the most difficult of our Republican candidates. Why? Because his opponent is Gene Kelley, whose well-known name can be enough to get him elected unless we educate the voters. Kelley is rated unqualified by the majority of our state's lawyers – join us in supporting the only candidate for Place 2, Justice James Baker. Please help today.

[Campaign Flyer Omitted In Printing]

May we please have the following information?

The Justice James A. Baker Campaign is required by the new Texas election law to collect the following from you:

_____

Name (please print)

_____

Occupation Job Title

_____

Employer
Is this a law firm? [ ] Yes [ ] No

_____

Home Work

_____

Spouse

_____

Spouse's Occupation Job Title

_____

Spouse's Employer
Is this a law firm? [ ] Yes [ ] No

If contributor is a minor, please check here and complete the information below.

Parent or Guardian's Name(s)

_____

Parent or Guardian's Occupation(s)

_____

Parent or Guardian's Employer(s)

Is this a law firm? [ ] Yes [ ] No

Under the new law affiliation with a law firm includes any partner, associate, shareholder or employee and any person designated "of counsel" to the firm or "of the firm." A contribution by the spouse or child of an individual is considered to be a contribution by the individual. The $30,000 contribution limit placed on all contributions from members of a firm includes contributions by their spouses and children and the law firm's general-purpose political committee.

VERIFICATION

STATE OF TEXAS §
§
COUNTY OF NUECES §

On this day, Robert C. Hilliard appeared before me, the undersigned notary public, and after I administered an oath to him, upon his oath, he said he read **RESPONDENTS' MOTION TO RECUSE JUSTICE JAMES A. BAKER**, the facts in it are within his personal knowledge, and are true and correct.

/s/ Robert C. Hilliard
Robert C. Hilliard

SWORN TO AND SUBSCRIBED before me by Robert C. Hilliard on the 9th day of April, 1996.

(SEAL) NANCY WEBSTER
MY COMMISSION EXPIRES
APRIL 1, 1998

/s/ Nancy Webster
Notary Public in and
for the State
of Texas

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing instrument was sent to all counsel of record listed below by fax and certified mail on this the 9th day of April, 1996.

/s/ Robert C. Hilliard
Robert C. Hilliard

FAX NO. 713/223-3717
CM/RRR Z 278 687 744

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TEXAS LAWYER NOVEMBER 24, 1997

Lawyers Who Bad-Mouth Judges May Answer to State Bar

by SUSAN BORRESON

Call it free speech of overkill, but lawyers who push the envelope in pleadings could wind up defending themselves against misconduct charges thanks to some fed-up judges who seem more willing than ever before to tattle to the State Bar.

But some grievance lawyers and judges say the referral of lawyers to the State Bar general counsel should remain a rarely used option by judges and courts who get raked over the coals in briefs or motions, and should not replace a court's traditional internal sanctions of imposing a fine or striking a pleading.

"You don't want to confuse contemptuous behavior with unethical behavior," says Michael Schneider, chief justice of Houston's 1st Court of Appeals.

At least seven lawyers this year have gotten into hot water with appeals courts for bad-mouthing or criticizing judges in motions or briefs that the courts deemed disrespectful and possible violations of the Texas Disciplinary Rules of Professional Conduct.

In the most recent case, the state Supreme Court on Nov. 13 threatened Robert Hilliard, of Corpus Christi's Hilliard & Muñoz, and his two co-counsel with monetary sanctions and a grievance investigation after Hilliard authored a motion for rehearing that called the justices "nine nutty professors." The motion also named the court as one of the four horsemen of the apocalypse.

Lawyers' rhetoric in court filings is nothing new to judges. But State Bar General Counsel Steve Young says such referrals, especially for statements made about a judge or court in the context of a case, are few and far between. "There's a sense that judges are willing to deal with things in their courts, through sanctions or otherwise, but unwilling to go that extra step sometimes," says James McCormack, former State Bar general counsel. The recent rash of referrals may signal a slight shift by courts to report alleged misconduct, McCormack says.

Rule 8.03(a) of the disciplinary rules requires lawyers to report another lawyer's possible misconduct "that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." The rule is repeated in canon 3D(2) of the Texas Code of Judicial Conduct.

But some observers question whether the Bar should spend its time investigating behavior that arguably results in nothing worse than hurt feelings. "I guess I'd be hard-put to approve of disciplining a lawyer for what amounts to basically hyperbole," says Charles Silver, a University of Texas School of Law professor who teaches professional responsibility. "This is a tough thing for a court to allow, because they're used to having tremendous deference," Silver says. "[But] it's not necessarily an illegitimate strategy. I'm much more concerned when lawyers misrepresent the facts and the law, which it seems to me they are far freer to do, than I am when they insult judges."

[Picture Omitted In Printing]

Texas Supreme Court Justice Raul Gonzalez says the court's action in Hilliard's case had nothing to do with the judges' sensibilities, but rather respect for the judiciary. "My feelings are bruised every day. You can't be in office and have your feelings not be hurt," Gonzalez says. "If this is all there was, we'd be making a big to-do about nothing."

Indeed, Gonzalez says if he had seen the motion sooner, he would have urged the court to strike it and order Hilliard to refile, delaying the case another few months. The motion was filed when most justices were on vacation or educational leave, he says. The court asked the clerk to flag potentially offensive pleadings and inform the court as soon as possible, Gonzalez says.

One Lawyer's Rhetoric

One lawyer's rhetoric could be another's winning argument, and the recent spate of grievance referrals could chill passionate advocacy, say Hilliard and other lawyers referred to the Bar. "If they decide to make an example out of me, there's probably going to be very little objection to whatever any court does, from now on," Hilliard says.

The recent rash of referrals may signal a heightened willingness of courts to report alleged lawyer misconduct.

Hilliard has fought this battle before. The 13th Court of Appeals in 1994 referred him to the Bar for statements

he made in a motion for en banc rehearing in the same case that has now landed him in trouble with the state Supreme Court. The grievance, Hilliard says, did not result in any sanction.

In that motion, Hilliard said the court had "mutilated" his client, the daughter of a woman who had taken the anti-morning sickness drug Bendectin. The appeals court had thrown out the entire $33.75 million damage award against Merrell Dow Pharmaceuticals, but did reconsider its decision and reinstated the $3.75 million in actual damages.

The state Supreme Court in July threw out the entire damage award in the case, *Merrell Dow Pharmaceuticals Inc. v. Ernest Havner, et al,* No. 95-1036, prompting Hilliard's controversial motion for rehearing. Hilliard authored most of the motion. Appellate lawyer Rebecca Hamilton, of Rockwall's White, White & Hamilton, contributed the law research portion; she says she suggested that Hilliard cut out the controversial remarks, but fully supports Hilliard and the motion. Hilliard's co-counsel at trial, Barry Nace of Washington, D.C.'s Paulson, Nace & Norwind and a former president of the Association of Trial Lawyers of America, could not be reached for comment.

The court ordered the lawyers to respond by Dec. 4 with reasons why the court should not refer them to the Bar, prohibit Nace from practicing in Texas courts, and impose monetary sanctions; it denied Hilliard's request for oral argument on the issue. The court cited Rule 8.02 of the disciplinary rules, which prohibits lawyers from making a statement they know to be false or with reckless

disregard as to its truth or falsity about the qualifications or integrity of a judge.

The burden of proving a lawyer lied, recklessly or knowingly, is a heavy one, says John Gladney, a Houston solo who defends lawyers in grievances. Gladney says a 9th U.S. Circuit Court of Appeals decision in 1995 held that speech against judges is protected unless proven to be false. Young disputes whether that case would be binding in Texas, which he says has no case law directly on this point.

Promoting Respect

Chief justices of the appeals courts that referred lawyers to the general counsel say they take such action only when warranted, and are reinforcing respect for the judiciary. "In a world that seems to have an increasing lack of any sort of dignity or rules – when we're talking about the president's privates, for instance – I think it's important that a certain amount of decorum and respect is in the courts," says Chief Justice Phil Hardberger of San Antonio's 4th Court of Appeals.

Fort Worth's 2nd Court of Appeals in October referred Eldridge Goins, Jeffrey Wigder and James Morris Jr., all of Dallas' Goins, Underkofler, Crawford & Langdon, to the Bar for filing an allegedly frivolous motion to recuse the three-judge panel that heard their client's appeal. "I thought we went to the court with respect and deference, and to exercise our clients' rights, and we came back . . . being severely chastised," says Goins, who declines comment on the grievance because it is ongoing.

The 4th Court of Appeals in May sanctioned San Antonio solo R. Emmett Cater $500 and referred him to the Bar for statements he made in a brief about the trial judge, former Baylor University School of Law Dean Charles Barrow, who ruled against his client in a divorce case property dispute. Barrow's "pathetic determination to 'take from the rich and give to the poor' . . . is a classic example of disregard for the law and the facts, by a man incompetent to comprehend the case at hand," Cater wrote. He later apologized. The grievance is pending, Cater says.

Also earlier this year, the 4th Court referred Marynell Maloney of San Antonio's Law Offices of Maloney & Maloney to the Bar for making statements critical of the court in a motion for rehearing. She could not be reached for comment.

TexLaw *The Supreme Court's rulings in Havner are available on TexLaw. See Page 35 for details.*

www.texlaw.com

APPENDIX N

IN THE SUPREME COURT OF TEXAS

No. 95-1036

MERRELL DOW PHARMACEUTICALS, INC., PETITIONER

v.

ERNEST HAVNER AND MARILYN HAVNER ON BEHALF OF THEIR MINOR CHILD KELLY HAVNER, RESPONDENTS

ON APPLICATION FOR WRIT OF ERROR TO THE COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS

ORDER

1. In accordance with Cannon 3D(2) of the Texas Code of Judicial Conduct, the Court will contact the District 11A Grievance Committee and the Office of General Counsel regarding Robert C. Hilliard for any disciplinary action that may be appropriate.

2. In accordance with Rule XIX(d) of the Rules Governing Admission to the Bar, the Court will contact the District 9 Grievance Committee regarding Barry J. Nace for any disciplinary action that may be appropriate.

3. All motions pending before this Court as of this date are overruled.

Done at the City of Austin, this 11th day of December, 1997.

JOHN T. ADAMS, CLERK
SUPREME COURT OF TEXAS

By /s/ Elizabeth A. Saunders
Elizabeth A. Saunders
Chief Deputy Clerk

(Dissenting opinion on order of referral by Justice Spector)

(Justice Baker not sitting)

APPENDIX O

IN THE SUPREME COURT OF TEXAS

No. 95-1036

MERRELL DOW PHARMACEUTICALS, INC., PETITIONER

v.

ERNEST HAVNER AND MARILYN HAVNER ON BEHALF OF THEIR MINOR CHILD KELLY HAVNER, RESPONDENTS

ON APPLICATION FOR WRIT OF ERROR TO THE COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS

JUSTICE SPECTOR, dissenting to the order of referral dated December 11, 1997.

I do not dispute that much of the *Havner* motion for rehearing is an intemperate attack on the members of this Court. I would have preferred, of course, that the movant's attorneys had dispensed with the inflammatory rhetoric and concentrated on the critical legal issues involved. Nevertheless, I do not believe that their writing can possibly form the basis for lawyer discipline.

Further, more than fifty years ago Justice Black recognized (in the context of a contempt proceeding for statements published in a newspaper) that attempts to stifle criticism of judges and our courts may, in fact, be counterproductive:

> The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.

Bridges v. California, 314 U.S. 252, 270-71 (1941). I therefore do not join the other members of this Court in today's order of referral.

Rose Spector
Justice

OPINION DELIVERED: December 11, 1997

APPENDIX P

No. 13-92-00540-CV

IN THE
SUPREME COURT
OF TEXAS

MERRELL DOW PHARMACEUTICALS, INC.,

Petitioner,

vs.

ERNEST HAVNER & MARILYN HAVNER
ON BEHALF OF THEIR MINOR CHILD
KELLY HAVNER,

Respondents.

Appealed from the Thirteenth Court of Appeals
At Corpus Christi, Texas

MOTION BY AND OF BARRY J. NACE FOR RECONSIDERATION AND TO RESCIND THE ORDER REFERRING HIM TO THE GRIEVANCE COMMITTEE

Comes now your petitioner and moves this Court to reconsider and rescind the Order referring him to the grievance committee for the following reasons.

1. He did not write, see, approve, incite, sign or in any way have anything to do with the pleading (Motion for Rehearing) filed in this case that was the subject of the Show Cause Order AS ALL OF THE EVIDENCE AND ALL OF THE STATEMENTS OF ALL ATTORNEYS IN THE CASE CONFIRM.

2. Co-counsel in this case have confirmed the foregoing and stated that your Petitioner did not write a single word of said pleading. (See Motion for Clarification, p. 3, 4; Nace Affidavit; Hamilton Affidavit). Your Petitioner "did nothing in regards to the motion." (See Hilliard affidavit, attached). "Nothing."

3. Three counsel were noted by the Court in its show cause order. One wrote "much"; a second wrote "some"; and the third, your petitioner, wrote "none", i.e. he had absolutely nothing to do with, nor wrote any of the Motion for Rehearing.

4. The counsel who wrote "some", Ms. Hamilton, is a woman, a Republican, and a citizen of Texas. (See Brief, p. 3).

5. The counsel who wrote "none", your petitioner is a man, a Democrat and not a citizen of Texas.

6. A. Ms. Hamilton stated that she contributed to only three pages in the Motion for Rehearing that were the subject of the Court's Show Cause Order. Your Petitioner wrote none of any of the pages referred to by the Court, did not contribute to those pages, and did not contribute to any part of the brief.

B. Ms. Hamilton wrote the legal analysis portion of the Motion and not the Argument Portion. Your Petitioner wrote neither.

C. Ms. Hamilton did not sign the Motion, neither did your Petitioner.

D. Ms. Hamilton was not lead counsel and had no authority to make decisions on the use of rhetoric;

your Petitioner never even had such an opportunity – nor authority; and

E. Ms. Hamilton acted in good faith. So did your Petitioner who did not even recommend filing *any* motion. (See Hamilton Response, p. 2).

7. Ms. Hamilton has "supported every current member of this Court". Your Petitioner has never supported any member of this Court. But, he did not support any of their opposition.

8. Ms. Hamilton was not referred to the grievance committee. Your Petitioner was.

9. Your petitioner is left with the question of how, since it is undisputed that he *was not* involved with the Motion for Rehearing, he was referred to the grievance committee. Ms. Hamilton, however, *was* involved with the Motion for Rehearing and she was not referred. Is the only proper conclusion of why there is a difference in treatment being that she is a woman and your petitioner is not; or that she is a Republican who supported every current member of this Court and he is a Democrat; or that she is a citizen of Texas and he is not; or a combination of all three. In any event such would be considered a discriminatory act.

10. Your petitioner concludes that since he had nothing to do with the Motion for Rehearing in any way – which is uncontested in this record – that there must be some other reason why this court is harassing him.

11. Your petitioner has been counsel in Texas only in this case. He treated the trial court with respect at all times, he treated the intermediate Court of Appeals with

respect at all time; and the video-taped argument before this Court will show he was eminently respectful. He has never filed any pleadings in this case that were not respectful. Why then has this court taken the action it has?

12. Your petitioner has served the Bar over his 25 years of practice. A review of his curriculum vitae attached shows numerous volunteer services on behalf of the Bar including his current participation as an appointed member (by the District of Columbia Court of Appeals) of the Unauthorized Practice of Law Committee of the D.C. Bar; membership in the American Law Institute; Trustee of the Roscoe Pound Association; and many other volunteer bar association activities.

13. Your petitioner has served, as a volunteer, as President of the Association of Trial Attorneys of America.

14. Your Petitioner is a member of four state bars; a member of the Bar of the United States Supreme Court; and a member of numerous Circuit Bars.

15. Your Petitioner has already been hurt by this Court's conduct. A reporter began a telephone conversation the night of the Order (December 11, 1997) by saying, "I understand you're the lawyer who wrote the brief that said . . . ".

16. Since your Petitioner clearly had nothing to do with the pleading that was the subject of the show cause order, he can only conclude that there is some other reason why the Court has taken the action it has, unless it has just made a mistake.

17. Perhaps the Court wanted your Petitioner to apologize for that which he has not done and beg for forgiveness. Your Petitioner will not, as he did nothing – he made no mistake.

18. The action of this Court under the circumstances has greatly damaged your Petitioner and his reputation, which has been earned over 25 years, and will continue to damage and injure him. This Court has inflicted great emotional distress upon your petitioner.

19. This Court issued a Show Cause order and if failure to have performed any offending act in any way and in any capacity is not a sufficient showing, then what is? How much more innocent could one be?

20. If this Court does not reconsider and rescind the referral, your Petitioner is going to continue to be harmed by the erroneous act and will have to take steps – expensive ones – to prove his innocence and restore his good name and to learn why this action has been taken.

21. If a lawyer has to put up with this kind of abuse of power in the absence of ANY evidence warranting a referral to the grievance committee and the obvious discrimination that exists here, it is a "sad day" and the legal profession is doomed and your Petitioner wants no part of such a system.

22. Indeed your Petitioner takes this so seriously that he is prepared to give up his law practice to devote full time to trying to recover his good name, take whatever legal action necessary, and fight this clear abuse of power.

23. At this point in time there hasn't been one iota of evidence (or even an opinion) asserting what it is your Petitioner did or did not do. Clearly there is a lack of due process and a clear violation of every rule of this Court.

24. What this Court has done is not just; it is unfair; and it is just plain wrong. It is hoped that this court would end the matter right now by rescinding its Order referring the undersigned to the Grievance Committee.

Respectfully submitted,

/s/ Barry J. Nace
Barry J. Nace

District of Columbia: SS

Subscribed and sworn to before me this 15th day of December, 1997.

/s/ Melissa A. Van Vugt
Melissa A. Van Vugt
Notary Public, District of Columbia
My Commission Expires: October 14, 2002

CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing Motion By and Of Barry J. Nace For Reconsideration and To Rescind the Order Referring Him To The Grievance Committee on all interested parties and their counsel. I have not served counsel for Merrell Dow Pharmaceuticals, Inc., as Petitioner did not seek sanctions against counsel for Respondents in connection with the Motion for

Rehearing. I served this Motion by United States mail on this 15th day of December, 1997.

/s/ Barry J. Nace
Barry J. Nace

Robert C. Hilliard, Esq.
Hilliard & Munoz, P.C.
719 South Shoreline Boulevard
Suite 600
Corpus Christi, TX 78401

Gerald L. Spence, Esq.
Spence, Moriarity & Schuster
P.O. Box 548
Jackson, Wyoming 83001

William J. Dorsaneo, III, Esq.
SMU School of Law
P.O. Box 750116
Dallas, TX 75275

Rebecca Hamilton, Esq.
Todd W. White, Esq.
White, White & Hamilton, P.C.
118 East Rusk Street
Rockwall, TX 75087

NO. 95-1036

IN THE SUPREME COURT OF TEXAS

MERRELL DOW PHARMACEUTICALS, INC.,

Petitioner,

VS.

ERNEST and MARILYN HAVNER, on Behalf Their Minor Child, KELLY HAVNER,

Respondents,

On Motion for Rehearing

AFFIDAVIT OF ROBERT C. HILLIARD

COUNTY OF NUECES)
)
STATE OF TEXAS)

On this the 12th day of December, 1997, Robert C. Hilliard appeared personally before me, the undersigned authority, and, upon being duly sworn by me, Mr. Hilliard attested, deposed, and swore as follows:

"1. The motion made the basis of this Court's recent referral has a simple history. Easy to follow and understand. I wrote the motion save for parts of the legal writing which were penned by Rebecca Hamilton. Prior to filing Ms. Hamilton reviewed, considered, and supported the entire motion. She took a stand for justice of which she was proud. Mr. Nace, who tried the case with me and who argued the case with me in front of this

Court, did nothing in regards to the motion. Nothing. Yet, this court cuts Ms. Hamilton loose and sends Mr. Nace to the grievance committee. If this court is referring lawyers who knew nothing of the motion's contents (apparently the typed name on the motion does not cause this Court to be grieved as Ms. Hamilton's name was typed on the motion, as well as Mr. Nace's) to the grievance committee, then please consider the entire list of licensed lawyers in Texas."

FURTHER, AFFIANT SAYETH NAUGHT.

/s/ Robert C. Hilliard
Robert C. Hilliard

SWORN TO AND SUBSCRIBED before me, the undersigned Notary Public on this the 12th day of December, 1997, to certify which witness by hand and seal.

(SEAL) SUSAN F. TAYLOR
Notary Public
STATE OF TEXAS
My Comm. Exp.
June 8, 2000

/s/ Susan Taylor
Notary Public, Nueces County, Texas

CURRICULUM VITAE
BARRY J. NACE

HOME	:	6208 Garnett Drive Chevy Chase, Maryland 20815 (301) 657-9393
OFFICE	:	Paulson, Nace & Norwind 1814 N Street, N.W. Washington, D.C. 20036 (202) 463-1999
PERSONAL	:	Born: York, Pennsylvania November 28, 1944 Married: Andrea G. Nace Children: 3 boys: Christopher, Jonathan, Matthew
EDUCATION	:	Dickinson College, B.S. in Chemistry, 1965 Dickinson School of Law, 1969, J.D. Dickinson School of Law, 1994, L.L.D.
MAJOR AREAS OF PRACTICE	:	Medical Malpractice, Drug Product Liability, Trial and Appellate Practice
BOARD CERTIFICATION	:	National Board of Trial Advocacy, Civil Pracitce [sic]

BAR MEMBERSHIPS	:	United States Supreme Court, 1973 Maryland, 1970 District of Columbia, 1971 Pennsylvania, 1972 West Virginia, 1997 U.S. District Court for the District of Columbia U.S. District Court for the District of Maryland U.S. District Court for the Eastern District of Pennsylvania U.S. Courts of Appeal for the Fourth, Sixth and District of Columbia Circuits U.S. Patent Office, Reg. No. 25776
COURT APPOINTMENTS	:	D.C. Court of Appeals: Unauthorized Practice of Law Committee, 1994 – 2000
BAR ASSOCIATIONS & FOUNDATIONS	:	ASSOCIATION OF TRIAL LAWYERS OF AMERICA President, August 1993 – July 1994 President-Elect, July 1992 – August 1993 Vice-President, July 1991 – July 1992 Treasurer, 1989-1991 Board of Governors, 1978-1987

Home Office and Budget Committee
1984-1988, 1989-1991
Chairman, Public Relations Dept. 1980-1982
Vice Chairman, Professional Research and Development, 1983
Chairman, Administration Dept. 1985-1986
State Delegates, 1988-1989; Vice-Chair, 1988-1989
ATLA Exchange Advisory Committee, 1987-1990
ParaLegal Advisory Committee, Chairman 1989-1990

INTERNATIONAL ACADEMY OF TRIAL LAWYERS
D.C. TRIAL LAWYERS ASSOCIATION President, 1977-1978
President, 1986-1987
MARYLAND TRIAL LAWYERS ASSOCIATION
WEST VIRGINIA TRIAL LAWYERS ASSOCIATION
PENNSYLVANIA TRIAL LAWYERS ASSOCIATION
ASSOCIATION OF PERSONAL INJURY LAWYERS IN GREAT BRITAIN
TRIAL LAWYERS FOR PUBLIC JUSTICE
Founding Member
Board Member, 1987-1988

D.C. BAR ASSOCIATION
Negligence Division, Steering Committee 6 years

BAR ASSOCIATION OF D.C.

Chairman, Medical-Legal Committee, 1980

MONTGOMERY COUNTY BAR ASSOCIATION

ROSCOE POUND FOUNDATION
Board of Trustees, 1993-1995
Permanent Honorary Trustee, 1995
Participant, 1989 Warren Conference, Roscoe Pound Foundation of "Medical Quality and the Law"

AMERICAN BOARD OF TRIAL ADVOCATES, Associate

AMERICAN BOARD OF PROFESSIONAL LIABILITY ATTORNEYS, Diplomate [sic]

LAMBERT SOCIETY, Trustee

CIVIL JUSTICE FOUNDATION

POLITICAL ACTIVITIES	:	ATLA PAC Chair, 1995 – 1997 (Trustee 1992 – 1997) DC LEGAL (Trustee 1977 – 1994)
ELECTED MEMBERSHIPS	:	Counsellors Who's Who in American Law Scribes Best Lawyers in America
PUBLICATIONS	:	"A Checklist for Maximizing Damages," *Trial*, June, 1981 "Epidemiological Evidence," *Trial*, October, 1988 Book Reviewer for Lawyer's Medical Journal and Medical Trial Technique Quarterly Contributing Author, *Trauma* "Standard of Proof in Drug and Toxic Tort Product Liability Cases – 'Preponderance' or 'Scientific Certainty' ", *Products Liability Law Journal*, 1988 "Presenting the Medical Evidence: Paraplegia and Sequelae from a Ruptured Aorta", *Trauma*, April, June, 1988

"Expert Evidence, Groping For Consensus in Science and Law," *Trial*, September 1992

"The Call to Lead", *Trial*, August 1993

"Assault on the Jury: The Story of a Pharmaceutical Case", *Trial*, September 1993

"Daubert: Victory for the Jury", *Trial*, October 1993

"Juror Bashing: Attack on the People", *Trial*, November 1993

"The ADR Debate: Efficiency Before Justice?", *Trial*, December 1993

"Exposed: The Campaign to Destroy Justice", *Trial*, January 1994

"Health Care Consumers: The Unnecessary Bargaining Chips", *Trial*, February 1994

"Update from Capitol Hill", *Trial*, March 1994

"The 'Legal Scholars' Speak on Contingency Fees", *Trial*, April 1994

"Fighting for Justice", *Trial*, May 1994

"Committees Make Strides in Civil Justice Battle", *Trial*, June 1994

"Keeping the Public Conscience", *Trial*, July 1994

"The Contingent Fee," *Trial*, October 1994
"Who'd have thought?" *Trial*, December 1996
"Products Liability: Tips and Tactics" *Trial*, November 1997

EDUCATIONAL ACTIVITIES : American Law Institute
American Inns of Court (Master)
National College of Trial Advocacy, Lecturer and Workshop Leader
NITA Patent Trial Practice Program Leader
Guest lecturer at Dickinson School of Law, George Washington University, and American University of Law Schools in Medical Malpractice and Product Liability Law, and to the D.C. Medical Society
Guest lecturer for Association of Trial Lawyers of America at numerous seminars and for the Arizona, Arkansas, California, Colorado, Connecticut, Metropolitan District of Columbia, Florida Academy, Indiana, Iowa, Kansas, Kentucky, Maryland, Minnesota, Mississippi, Missouri, Montana, New Hampshire, New Jersey,

New Mexico, New York State, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Philadelphia, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington State, West Virginia, Wyoming Trial Lawyer Associations and other Bar Associations
Phi Kappa Phi Annual Convention
Expert Witness Seminar, San Francisco, April, 1993
Australian Trial Lawyers, September, 1993
American College of Legal Medicine, March 1994
ALI-ABA Program on Product Liability, August, 1994
Numerous radio and TV programs including: The Pat Buchanan Show; Kamber-O'Leary Report; It's Your Business; Techno-Politics; Fox Morning Show; and others

LEGISLATIVE ACTIVITIES : Testified before Maryland House of Delegates and D.C. City Council on Malpractice Legislation on numerous occasions

SYMPOSIUM	:	Brookings Institute, Charting a Future for the Civil Jury System, Invited Participant
NOTABLE APPELLATE DECISIONS	:	*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786 (1993) *Ambrosini v. Labarraque, M.D., et al.*, 966 F.2d 1464 (D.C. Cir. 1992) *DePyper v. Paul F. Navaro, D.O.*, No. 11630 (Mich. Ct. App. May 9, 1991) *Oxendine v. Richardson-Merrell, Inc.*, 506 A.2d 1100 (D.C. 1986); 563 A.2d 330 (D.C. 1989) *In Re Bendectin*, 749 F.2d 300 (1985) *Lamade v. Wilson*, 512 F.2d 1348 (D.C. App. 1975) *Jacron v. Sindorff*, 27 Md. App. 53, 341 A.2d 856 (Md. Ct. App., 1975) *Adkins v. Morton*, 494 A.2d 652 (D.C. App. 1985 *Nimetz v. Cappadona*, 596 A.2d 603 (D.C. App. 1991)
AWARDS	:	Attorney of the Year, 1976, Metropolitan Washington, D.C. Trial Lawyers Association Nominated and Finalist for Attorney of the Year

by Trial Lawyers for Public Justice, 1984, 1986, 1988, and 1995

Special Recognition Award, D.C. Trial Lawyers Association, 1988

Outstanding Achievement Award, 1994, Trial Lawyers Association of Metropolitan Washington, D.C.

HOBBIES : Coaching baseball for youths
Golf
Racquetball
Reading

APPENDIX Q

IN THE SUPREME COURT OF TEXAS

No. 95-1036

MERRELL DOW PHARMACEUTICALS, INC.,
PETITIONER,

v.

ERNEST HAVNER and MARILYN HAVNER ON
BEHALF OF THEIR MINOR CHILD,
KELLY HAVNER, RESPONDENTS.

On Motion for Rehearing

**AFFIDAVIT OF REBECCA E. HAMILTON
IN SUPPORT OF MOTION BY
AND OF BARRY J. NACE
FOR RECONSIDERATION AND TO RESCIND THE
ORDER REFERRING HIM TO
THE GRIEVANCE COMMITTEE**

STATE OF TEXAS §
§
COUNTY OF ROCKWALL §

On this, the 17th day of December, 1997, Rebecca E. Hamilton appeared personally before me, the undersigned authority, and, upon being cautioned and sworn

by me, Ms. Hamilton attested, deposed and swore as follows:

1. "I am Rebecca E. Hamilton. I am over the age of 18, have never been accused, charged, or convicted of any crime of moral turpitude or felony. I have no mental disabilities. I am fully competent to execute this Affidavit and have personal knowledge of the facts I aver herein.

2. I have reviewed the Motion by and of Barry J. Nace for Reconsideration and to Rescind the Order Referring Him to the Grievance Committee ("Motion to Rescind").

3. I was present during the physical drafting and finalization of the Motion for Rehearing at issue. As he states in ¶ 1 of his Motion to Rescind, Mr. Nace did not write, approve, incite, or sign the Motion for Rehearing. Not one word.

4. Indeed, Mr. Nace counselled against filing *any* pleading seeking rehearing as it was his belief that such could not prevail."

FURTHER, AFFIANT SAYETH NAUGHT.

/S/ Rebecca E. Hamilton
Rebecca E. Hamilton

SWORN TO AND SUBSCRIBED before me, the undersigned Notary Public, on this, the 17th day of December, 1997, to certify which witness my hand and seal.

/s/ Nancy Semple
Notary Public in and for
the State of Texas

[SEAL] NANCY SEMPLE
MY COMMISSION EXPIRES
June 30, 2001

APPENDIX R

IN THE SUPREME COURT OF TEXAS

No. 95-1036

MERRELL DOW PHARMACEUTICALS, INC.,
PETITIONER,

v.

ERNEST HAVNER and MARILYN HAVNER ON
BEHALF OF THEIR MINOR CHILD,
KELLY HAVNER, RESPONDENTS.

On Motion for Rehearing

RESPONDENTS' SECOND MOTION FOR REHEARING

Robert C. Hilliard
State Bar No. 09677700
HILLIARD & MUÑOZ, P.C.
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Corpus Christi, Texas 78401

Barry J. Nace
PAULSON, NACE
& NORWIND
1814 N. Street, N.W.
Washington D.C. 20036

Todd W. White
State Bar No. 21332700
Rebecca E. Hamilton
State Bar No. 08837050
WHITE, WHITE
& HAMILTON, P.C.
118 East Rusk Street
Rockwall, Texas 75087

COUNSEL FOR RESPONDENTS

ORAL ARGUMENT REQUESTED

IN THE SUPREME COURT OF TEXAS

No. 95-1036

MERRELL DOW PHARMACEUTICALS, INC.,
PETITIONER,

v.

ERNEST HAVNER and MARILYN HAVNER ON
BEHALF OF THEIR MINOR CHILD,
KELLY HAVNER, RESPONDENTS.

On Motion for Rehearing

RESPONDENTS' SECOND MOTION FOR REHEARING

COME NOW Respondents, Ernest and Marilyn Havner, on Behalf of Their Minor Child, Kelly Havner ("Kelly Havner"), and serve and file Respondents' Second Motion for Rehearing, and, in support thereof, respectfully show unto the Court the following:

ARGUMENT

A. Texas Law, as Well Federal Principles of Due Process, Require a Remand – And Not a Reversal – When This Court Changes the Common Law After a Jury Has Declared Its Verdict.

The Court's opinion in this appeal has changed the law of Texas as to the standard of review applicable in

cases involving scientific evidence – perhaps even all evidence proffered by experts. The Court has held for the first time in this history of Texas jurisprudence that:

(1) A trial court must independently evaluate an expert's underlying data in determining whether the expert's opinion is reliable and, therefore (presumably) legally sufficient (Opinion at 12);

(2) The factors the Court previously has held as relevant to admissibility of expert evidence, *vis.*, the *Robinson* factors, are relevant to a no evidence review of scientific evidence (Opinion at 15);

(3) Prior to "properly designed and executed epidemiological studies" being deemed legally sufficient, the offering party must demonstrate a "doubling" of the risk at issue (Opinion at 23);

(4) In addition to a showing of a doubling, "Other factors must be considred," such as the "design and execution of epidemiological stud[ies]," and what the "relative risk factor" is (while the Court does not conclude that a relative risk factor of 3 is required, it impliedly rejects a risk factor of 2) (Opinion at 25-27); and

(5) The offering party's expert must predicate his conclusions on a confidence level of not less than 95% (Opinion at 37).

Indeed, the Court appears to merge the issue of reliability (and, therefore, admissibility) and evidentiary sufficiency:

> In sum, we emphasize that courts must make a determination of reliability from all the evidence. Courts should allow a party, plaintiff or defendant, to present the best available evidence, assuming that it passes muster under *Robinson*, and only then should a court determine from a totality of the evidence, considering all factors, affecting the reliability of particular studies, whether there is legally sufficient evidence to support the judgment.

(Opinion at 30.)

Since the Court issued its opinion in this matter, the United States Supreme Court has issued a decision in *General Electric Co. v. Joiner*, Cause No. 96-188, 1997 U.S. LEXIS 7503 (Dec. 15, 1997) (Respondents attach a copy of *Joiner* hereto, for the Court's convenience). In *Joiner*, the Supreme Court addressed the issue of "what standard of review an appellate court should apply in reviewing a trial court's decision to admit or exclude expert testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786 (1993). *Id.* at *5-6. The Court held that the correct standard is "abuse of discretion." *Id.* at *6.

Though holding for the defendant in that "toxic tort" case[1], the Court observed, "Trained experts commonly extrapolate from existing data. But nothing in either

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[1] Justice Stevens, in his concurrence and dissent, observed, "In any event, it bears emphasis that the Court has not held that it would have been an abuse of discretion to admit the expert testimony. The very point of today's holding is that the abuse of discretion standard of review applies whether the district judge has excluded or admitted evidence." *Id.* at 33.

Daubert or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the ipse dixit of the expert." *Id.* at *19. Here, the trial court judge chose to conclude that the experts' extrapolations from existing data were based on more than the "ipse dixit" of an expert. This decision in federal court, and under the preexisting Texas law, was due an "abuse of discretion" standard of review.

As Justice Breyer noted in his concurrence (Stevens, J., joining in part), "Yet, as amici have pointed out, judges are not scientists and do not have the scientific training that can facilitate the making of such decisions." *Id.* at *21. " 'A judge could better fulfill this gatekeeper function if he or she had help from scientists. Judges should be strongly encouraged to make a greater use of their inherent authority . . . to appoint experts. . . . Reputable experts could be recommended to the courts by established scientific organizations, such as the National Academy of Sciences or the American Association for the Advancement of Science.' " *Id.* at *24-25 (ellipses in original) (quoting from the Amicus Brief of The New England Journal of Medicine, 18-19).

Yet this Court's new decision effectively precludes such an option because it requires the trial court both to decide admissibility, based on "reliability," and then independently critique "reliability" in a separate, evidentiary sufficiency review, based on a scientist's techniques and conclusions, as well as his very data! This Court's detailed reanalysis of the evidence at trial makes clear that scientists' – experts' – appraisals and opinions regarding data are not dispositive; rather, judges (and not juries) determine the weight of the evidence.

It is within the province of this Court to create such law. And, having done so, it is up to litigants such as Kelly Havner to strive to satisfy this new requirement. And, yet can it seriously be disputed that this is entirely new law for Texas, both in terms of procedure (a trial court's initial reanalysis of data supporting expert conclusions) and substance (a trial court's determination of the credibility of an expert's conclusions). Indeed, in light of *Joiner*, this is new law in the United States.

Respondents thus respectfully contend that federal principles of due process, as well as the Texas Rules of Appellate Procedure, demand that the Court remand Kelly Havner's case for a new trial. The Texas Rules of Appellate Procedure provide:

> In each cause, the Supreme Court shall either affirm the judgment of the court of appeals, or reverse and render such judgment as the court of appeals should have rendered, or remand the cause to the court of appeals, or reverse the judgment and remand the cause to the trial court, *if it shall appear that the justice of the cause demands another trial.*

Tex. R. App. P. 180 (emphasis added). This Court frequently invokes Rule 180 as a basis for granting a litigant a new trial when it changes the law under which a party has tried her case. For example, in *Murray v. San Jacinto Agency, Inc.*, 800 S.W.2d 826 (Tex. 1991), this Court modified its prior holding in *Arnold v. National County Mutual Fire Insurance Co.*, 725 S.W.2d 165, 168 (Tex. 1987). *Id.* at 830. Writing for the Court, Justice Gonzalez stated:

> It is reasonable to assume that Murray, relying on *Arnold*, concluded that her cause of action

> accrued on the date SJA admitted its denial unwarranted. . . . Our decision today, however, modifies *Arnold* so that limitations on Murray's good faith claim commenced on the day SJA denied coverage. . . . Since we have modified the law, we will remand this case in the interest of justice to the trial court.

Id. at 830; *see also Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 433 (Tex. 1984) (op. on reh'g) (remanding when "the new theory or rule required new and different evidence"), and *L.M.B. Corp. v. Gurecky*, 501 S.W.2d 300, 303 (Tex. 1973) ("these changes in the trial practice justify this court's remand of this cause . . . in the interest of justice").

Indeed, Chief Justice Phillips recently has observed that, "Where it appears from the record that the losing party may be able to recover under some alternative factual or legal theory not pursued at the first trial, we have frequently remanded in the interest of justice." *Saenz v. Fidelity & Guaranty Insurance Underwriters*, 925 S.W.2d 607, 616 (Tex. 1996) (Phillips, C.J., dissenting); *see also Casso v. Brand*, 776 S.W.2d 551, 565-66 (Tex. 1989) (Chief Justice Phillips providing majority opinion but then dissenting on Court's failure to remand under Tex. R. App. P. 180).[2]

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[2] *See also: Continental S. Lines, Inc. v. Hilland*, 528 S.W.2d 828, 830-31 (Tex. 1975) (remand to allow plaintiff to pursue alternative legal theory); *Continental Casualty Co. v. Cook*, 515 S.W.2d 261, 263 (Tex. 1974) (*per curiam*) (same); *Members Mut. Ins. Co. v. Tapp*, 469 S.W.2d 792, 793 (Tex. 1971) (same); *Houston Fire & Casualty Co. v. Nichols*, 435 S.W.2d 140, 143 (Tex. 1968) (remand to allow plaintiff to offer different evidence); *C&R*

While it is a legal truism that due process does not protect a right to appeal in and of itself, once the state accords to litigants an appellate system governed by the common law and rules of practice, then due process requires that all litigants be treated in keeping with its protections. When this case began, Kelly Havner was a child with a misshapen hand – a birth defect she will carry as a reminder of this case her whole life, regardless of whether Bendectin or some genetic quirk of fate caused it. Now Kelly is a young woman, with the same hand but bereft of the verdict that a jury granted her under the system of law in effect at the time of trial. She patiently has awaited justice, and has followed this case avidly and eagerly, not merely as a participant but as an admirer of the American system of jurisprudence. For the Court now to deny her the new trial to which Texas law – as well as the rules of practice issued by this Court – accord her is to scar her soul as palpably as her hand is scarred physically.

WHEREFORE, PREMISES CONSIDERED, Respondents, Ernest and Marilyn Havner, on Behalf of Their Minor Child, Kelly Havner, move the Court to grant this Second Motion for Rehearing motion and grant Respondents' a new trial, and for such other and further relief, in

---

Trans., Inc. v. Campbell, 406 S.W.2d 191, 195-96 (Tex. 1966) (remand because jury may have misunderstood charge); *Scott v. Liebman*, 404 S.W.2d 288, 294 (Tex. 1966) (holding that remand is proper "when this Court changes the rules after the case has been tried"); *Aetna Ins. Co. v. Klein*, 325 S.W.2d 376 (Tex. 1959) (remand to allow plaintiff to put on different evidence); and *City of San Antonio v. Pigeonhole Parking*, 311 S.W.2d 218, 223 (Tex. 1958) (same).

equity or at law, general or special, to which they show themselves justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rule 190, Texas Rules of Appellate Procedure, I certify that I served a true and correct copy of this document by regular mail, on all counsel of record, as identified below, on this the 24th day of December, 1997.

/s/ Rebecca E. Hamilton
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APPENDIX S

(Seal) **THE SUPREME COURT OF TEXAS**
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RE: Case Number 95-1036
Case No. 13-92-00540-CV, in the Court of Appeals for the Thirteenth District
Case No. 88-3915-F, in the 214th Judicial District Court of Nueces County, Texas
Style: MERRELL DOW PHARMACEUTICALS, INC.
v.
ERNEST HAVNER and MARILYN HAVNER on behalf of their minor child KELLY HAVNER

Dear Counsel:

Today, the Supreme Court of Texas overruled respondents' motion for leave to file second motion for rehearing with the following notation: "*See* TEX. R. APP. P. 64.4." (Justice Spector notes her dissent.)

Also overruled is the motion of Barry J. Nace for reconsideration and to rescind the order referring him to the grievance committed. (Justice Spector notes her dissent.)

Sincerely,

John T. Adams, Clerk

by /s/ Elizabeth A. Saunders
Elizabeth A. Saunders
Chief Deputy Clerk

cc: Ms. Cathy Wilborn, Clerk
Mr. Oscar Soliz
Chief Justice Robert J. Seerden
Hon. Michael J. Westergren

APPENDIX T

IN THE SUPREME COURT OF TEXAS

No. 95-1036

MERRELL DOW PHARMACEUTICALS, INC.,

Petitioner,

V.

ERNEST HAVNER and MARILYN HAVNER, on Behalf of Their Minor Child, KELLY HAVNER,

Respondents.

On Motion for Rehearing

RESPONDENTS, ERNEST and MARILYN HAVNER, on Behalf of Their Minor Child, KELLY HAVNER'S, MOTION TO SEVER

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COUNSEL FOR RESPONDENTS

IN THE SUPREME COURT OF TEXAS

No. 95-1036

MERRELL DOW PHARMACEUTICALS, INC.,

Petitioner,

V.

ERNEST HAVNER and MARILYN HAVNER, on Behalf of Their Minor Child, KELLY HAVNER,

Respondents.

On Motion for Rehearing

RESPONDENTS, ERNEST and MARILYN HAVNER, on Behalf of Their Minor Child, KELLY HAVNER'S, MOTION TO SEVER

COME NOW Respondents, Ernest Havner and Marilyn Havner, on Behalf of Their Minor Child, Kelly Havner ("Respondents"), and, pursuant to Texas Rule of Appellate Procedure 60.6, serve and file Respondents' Motion to Sever, and, in support thereof, respectfully show unto the Court the following:

MOTION

On December 11, 1997, this Court entered an order in the above-styled and numbered cause, which order referred attorneys Robert C. Hilliard and Barry J. Nace to

the Grievance Committee of the State Bar of Texas in connection with the Motion for Rehearing Respondents filed in this matter. The December 11th Order did not refer to the merits of Respondents' case.

On January 16, 1998, this Court overruled the motion of counsel, Barry J. Nace, for reconsideration of and to rescind its December 11th Order, which referred Mr. Nace to the Grievance Committee. At the same time, the Court also overruled Respondents' motion for leave to file a second motion for rehearing, which motion addressed the merits of this case.

Messrs. Hilliard and Nace intend to appeal the Court's December 11th Order referring them to the Grievance Committee. Messrs. Hilliard and Nace have a serious and well-recognized interest in protecting their professional reputations. *Walker v. City of Mesquite,* 129 F.3d 831 (5th Cir. 1997) (stating that the Court is "persuaded beyond peradventure that one's professional reputation is a lawyer's most important and valuable asset"). Messrs. Nace and Hilliard further intend to appeal, on behalf of Respondents, the Court's decision on the merits.

According, and pursuant to Texas Rule of Appellate Procedure 60.6, Respondents move the Court to sever the Court's decision as to Messrs. Hilliard's and Nace's conduct and assign it to the Court's administrative docket, according it a new docket number in the process. Respondents do not seek to delay or hinder these proceedings but, rather, to avoid any further interference between the referral matter and the merits, in order that justice may be done. *See* and *compare In re Maloney,* 949 S.W.2d 385 (Tex. App. – San Antonio 1997, n.w.h.) (per curiam)

(Docket No. 04-97-00334-CV), *with Crestway Care Center, Inc. v. Hon. Berchelmann*, 945 S.W.2d 872 (Tex. App. – San Antonio 1997, mand. dism'd as improv. granted) (*en banc* op. on reh'g) (Docket No. 04-97-00070-CV).

WHEREFORE, PREMISES CONSIDERED, Respondents, Ernest and Marilyn Havner, on Behalf of Their Minor Child, Kelly Havner, move the Court to grant this Respondents' Motion to Sever and assign the grievance-related matters to the Court's administrative docket, with a new docket number, and for such other and further relief, in equity or at law, general or special, to which they show themselves justly entitled.

Respectfully submitted,

WHITE, WHITE & HAMILTON, P.C.

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ATTORNEYS FOR RESPONDENTS

CERTIFICATE OF SERVICE

Pursuant to Rule 190, Texas Rules of Appellate Procedure, I certify that I served a true and correct copy of this document by regular mail, on all counsel of record, as identified below, on this the 2nd day of February, 1998.

/s/ Rebecca E. Hamilton

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APPENDIX U

(Seal) **THE SUPREME COURT OF TEXAS**
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RE: Case Number 95-1036
Case No. 13-92-00540-CV, in the Court of Appeals for the Thirteenth District
Case No. 88-3911-F, in the 214th Judicial District Court of Nueces County, Texas

Style: MERRELL DOW PHARMACEUTICALS, INC.
v.
ERNEST HAVNER and MARILYN HAVNER on behalf of their minor child KELLY HAVNER

Dear Counsel:

Today, the Supreme Court of Texas overruled respondents' motion to sever in the above-referenced cause.

Sincerely,

John T. Adams, Clerk

by /s/ Elizabeth A. Saunders
Elizabeth A. Saunders
Chief Deputy Clerk

cc: The Hon. Darrell B. Hester
Ms. Cathy Wilborn, Clerk
Mr. Oscar Soliz

APPENDIX V

FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy or life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

FOURTEENTH AMENDMENT

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny

to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. 1257(3)(a)

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Supreme Court, U.S.
FILED
APR 9 1998
CLERK

No. 97-1508

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

ERNEST HAVNER, *et al.*,
Petitioners,

v.

MERRELL DOW PHARMACEUTICALS, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Texas

---

BRIEF FOR RESPONDENT MERRELL DOW IN OPPOSITION

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R. Stern, E. Gressman, S. Shapiro, & K. Geller, *Supreme Court Practice* (7th ed. 1993) 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1508

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MERRELL DOW PHARMACEUTICALS, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Texas

---

BRIEF FOR RESPONDENT MERRELL DOW IN OPPOSITION

JURISDICTION

For reasons set forth at pages 3-4 & 7-8 below, this Court lacks jurisdiction.

STATEMENT

This is a Bendectin case like *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). *See* Pet. 3 ("nature of the litigation is effectively identical to" *Daubert*). It was brought by the Havner petitioners against respondent Merrell Dow in state court in Texas.[1]

---

[1] Pursuant to Rule 29.6 of the Rules of this Court, respondent Merrell Dow Phamaceuticals, Inc. (now named Merrell Pharmaceuticals, Inc.) states that it is a wholly owned subsidiary of Hoechst

A 1991 trial resulted in a jury verdict for the Havners. After review in the intermediate appellate court, the Texas Supreme Court held that the Havners lacked sufficient evidence meeting minimum standards of scientific reliability to establish that Bendectin caused Kelly Havner's birth defect, and the court therefore ordered judgment for Merrell Dow. Pet. App. 1-66. The court's judgment accords with the result in every one of the numerous other Bendectin cases brought against Merrell Dow—all of which, to date, have been resolved in Merrell Dow's favor before trial, at trial, or on subsequent review. *See* Pet. App. 5-9 (citing decisions).[2]

The Havners filed a timely motion for rehearing (Pet. App. 67-112), which was denied on November 13, 1997, without an opinion on the substance of the motion (Pet. App. 113-117). In the order denying rehearing, the Texas Supreme Court directed the attorneys for the Havners to show cause why they should not be disciplined or subjected to sanctions for specified passages in their motion for rehearing. Pet. App. 116. After the attorneys responded (Pet. App. 133-291), the Texas Supreme Court, on December 11, 1997, decided that it would not impose any sanctions and instead referred two of the attorneys—who are among the petitioners here—to bar committees "for any disciplinary action that may be appropriate" (Pet. App. 292). Merrell Dow did not participate in the show-cause proceedings.

Marion Roussel, Inc. (formerly Marion Merrell Dow Inc.), which is owned by HMR Pharma, Inc., and Roussel Uclaf. The latter two companies are in turn wholly owned by Hoechst AG. Respondent has three foreign subsidiaries in which stock may be publicly available: Marion Merrell S.A. (Spain); Gruppo Lepetit S.p.A. (Italy); and Marion Merrell S.A. (France).

[2] The Pennsylvania trial court's adverse judgment in the *Blum* case, cited at Pet. App. 7, has been reversed on appellate review. *See Blum v. Merrell Dow Pharmaceuticals, Inc.*, No. 3711 Philadelphia 1995 (Superior Ct. Pa. Dec. 29, 1997).

ARGUMENT

The Court lacks jurisdiction under 28 U.S.C. §§ 1257 and 2101(c) to review any of the several orders of the Texas Supreme Court challenged in the petition. In any event, the petition presents no issue on the merits warranting this Court's review. Accordingly, the petition should be denied.

1. *The Judgment Against The Havners For Merrell Dow.* a. The Court lacks jurisdiction to review the judgment against the Havners on their claim against Merrell Dow, because the petition, filed March 11, 1998, is out of time. The Texas Supreme Court entered its judgment against the Havners on July 9, 1997, and denied a timely motion for rehearing on November 13, 1997. Pet. App. 60, 113-117. The denial of rehearing rendered the judgment for Merrell Dow against the Havners final for purposes of certiorari to this Court under 28 U.S.C. § 1257. The 90-day period authorized for a petition under 28 U.S.C. § 2101(c) and this Court's Rules 13.1 and 13.3 elapsed on February 11, 1998. No extension of time was sought or obtained. The petition, filed a month after it was due, was therefore untimely insofar as it challenges the judgment against the Havners in favor of Merrell Dow.

The Havners contend otherwise (Pet. 2, 1-14) by arguing that there was no final judgment when rehearing was denied on November 13, 1997, because the Texas Supreme Court simultaneously ordered the Havners' attorneys to show cause why they, the attorneys, should not be sanctioned or referred for discipline. Pet. App. 113-117. Because further proceedings were thus contemplated, the petition argues, the 90-day clock did not begin to run until the Texas Supreme Court created a final judgment, on December 11, 1997, by referring two of the attorneys to bar committees "for any disciplinary action that may be appropriate." Pet. App. 292-293. Although petitioners

could have filed the petition any time within the next two months and still met the deadline of February 11, 1998, they waited an additional month to file. The timeliness of the petition thus turns entirely on the contention that the finality of the July 1997 judgment effected by the November 1997 denial of rehearing was destroyed by the show-cause order to the attorneys. That contention should be rejected.

The November 1997 denial of rehearing fully resolved all the claims among the parties to the case, thus meeting the basic test of finality (a matter of federal law, *see Department of Banking v. Pink*, 317 U.S. 264, 268 (1942)): "it ended the litigation by fully determining the rights of the parties" (*id.* at 267). Upon denial of rehearing, this case was not one in which "the state courts still must conduct further substantive proceedings before the rights of the parties as to the federal issues are resolved." *Pennsylvania v. Ritchie*, 480 U.S. 39, 47 (1987), quoted at Pet. 11. Rather, the further proceedings contemplated by the show-cause order here involved only the attorneys, not the parties, and involved issues that were entirely collateral to all of the claims in the case. It is settled that pendency of attorney-fees or party-sanction proceedings, even though directly involving the parties, does not destroy finality of a merits judgment for purposes of the court of appeals' jurisdiction under 28 U.S.C. § 1291, precisely because of the collateral nature of such proceedings. *See Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988); *Brown v. Francis*, 75 F.3d 860, 864 n.3 (3d Cir. 1996); *Turnbull v. Wilcken*, 893 F.2d 256, 257 (10th Cir. 1990). With finality for purposes of this Court's jurisdiction under 28 U.S.C. § 1257 given at least as "practical" an approach, *see Budinich*, 486 U.S. at 201-02 (expressly drawing on § 1257 for ruling under § 1291), it follows *a fortiori* that finality of the judgment on the merits between the parties cannot be destroyed by

the even more collateral matter of disciplinary or other sanctions proceedings directed solely at an attorney. *Cf. Willy v. Coastal Corp.*, 503 U.S. 131, 137-38 (1992) (collateral nature of Rule 11 sanctions); *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 395-96 (1990) (same).[3]

Thus, the November 13, 1997, denial of rehearing in this case rendered the judgment for Merrell Dow against the Havners final. The petition to review that judgment was due February 11, 1998. The petition, not filed until March 11, 1998, was out of time.

b. Even aside from the jurisdictional defect, review of the July 1997 judgment against the Havners on their claim against Merrell Dow should be denied. Neither of the Havners' two challenges to the judgment warrants review.

The petition's first challenge is devoid of substance. The Havners contend (Pet. i (question #1); Pet. 17) that the Texas Supreme Court "may have" retaliated (Pet. 4) or did retaliate (Pet. 6) against the Havners on the merits because of the language their attorneys used in their motion for rehearing. A speculation like this, supported by not the slightest bit of evidence, does not warrant review.

The petition also challenges the July 1997 judgment on the ground that the Texas Supreme Court violated the federal due process and equal protection clauses by applying a different state-law evidentiary standard to the causation than was applicable at trial, yet not remanding for a new trial. *See* Pet. ii (question #3); Pet. 15-17. The threshold difficulty with this contention is that these federal constitutional grounds were not raised either before the Texas Supreme Court rendered its judgment or in the

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[3] Contrary to petitioners' suggestion (Pet. 6 n.7), the formalities of docket numbers cannot make a difference, as attorney fees and Rule 11 proceedings would ordinarily be carried out under the same docket.

Havners' timely motion for rehearing. *See* Pet. App. 78-96.[4] As the petition effectively concedes (Pet. 17 n.17), a federal due process claim (but not an equal protection claim) was raised in the second motion for rehearing (Pet. App. 319-325), but the Texas Supreme Court denied leave to file that motion as unauthorized under Texas rules (Pet. App. 330). The new federal constitutional claims not having been properly raised (or actually decided) below, their review in this Court is barred (whether as a jurisdictional or prudential matter). *See, e.g., Adams v. Robertson*, 117 S. Ct. 1028, 1029 (1997).

Petitioners' contention would not warrant review even if it had been adequately preserved. The Texas Supreme Court did not announce or establish any principle of federal law for this Court to review; and the Texas-law rule that "the justice of the cause" determines whether to order a new trial in a particular case (*see* Pet. App. 89) cannot be challenged as unconstitutional. The application of that rule here, moreover, raises no substantial question of federal law. No federal constitutional principle forbids a state supreme court to carry out the normal common-law process of elaboration and clarification of evidentiary standards or to make a determination that a particular clarification of a particular standard does not require a new trial in a particular case because there could be no material difference in the evidence presented or, more importantly, in the outcome. This case thus involves, at most, fact-specific judgments that the Texas Supreme Court opinion merely elaborated and clarified longstanding Texas-law standards demanding nonconjectural, reliable evidence to support a verdict; that petitioners had every incentive to make their best case for reliability at the time of trial; and that, in light of the mass of other

[4] The "Statement" portion of the motion for rehearing makes one unelaborated and inexplicable reference to "the Sixth Amendment." Pet. App. 75. No federal constitutional issue of any sort is raised in the motion for rehearing as a point of error or in the Argument section.

Bendectin cases reflecting the same packet of consistently inadequate causation evidence, there was no point in a remand. None of those implicit judgments warrant this Court's review.[5]

2. *The Orders Relating to Attorney Discipline.* a. The petition is jurisdictionally defective not only insofar as it seeks review of the judgment for Merrell Dow against the Havners, but also insofar as it seeks review of the discipline-related orders directed at the Havners' attorneys.[6] Those orders—the November 1997 show-cause order and the December 1997 order merely referring the attorneys to bar committees for possible disciplinary action—are not final. The orders did not "end[] the litigation by fully determining the rights of the [attorneys]" (*Department of Banking v. Pink*, 317 U.S. at 267); "further substantive proceedings" are still specifically contemplated "before the rights of the [attorneys] as to the federal issues are resolved" (*Pennsylvania v. Ritchie*, 480 U.S. at 47). At present, the only action taken has been a referral for further proceedings, and the attorneys' First Amendment claims will be available for any appropriate review upon completion of those proceedings, if any disciplinary action is ultimately taken. Thus, the petition's challenge to the discipline-related orders is premature: those orders are not "final judgments" as required by 28 U.S.C. § 1257. *Cf.* R. Stern, E. Gressman, S. Shapiro, & K. Geller, *Supreme Court Practice* § 3.7, at 107-08 (7th ed. 1993) (finality

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[5] To the extent that petitioners suggest a federal-law duty to write an opinion in denying rehearing (Pet. 17), even on state-law issues, the suggestion is baseless and conflicts with the routine practice of appellate courts.

[6] These latter orders do not directly involve Merrell Dow. Because petitioners nevertheless seek to use the discipline-related orders to delay the final conclusion of the Havners' case against Merrell Dow, the petition's challenge to those orders is briefly addressed here.

generally lacking where state court remands to administrative agency).[7]

b. In any event, the petition's challenge to the discipline-related orders—contending that those orders denied counsel's First Amendment right to criticize the court (Pet. i (question #2); Pet. 18-22)—does not warrant review. In *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), which the petition fails to cite, this Court reaffirmed that special circumscribed standards apply to an attorney's speech "in the courtroom itself, during a judicial proceeding." *Id.* at 1071; *see In re Sawyer*, 360 U.S. 622 (1959). If the relevant First Amendment standards are accordingly not absolutist, but instead call for context-specific judgments, review here is at least premature (as a prudential as well as jurisdictional matter). The Texas Supreme Court did not hold anyone in contempt or impose any sanctions; it merely referred two attorneys to bar committees "for any disciplinary action that may be appropriate" (Pet. App. 292). The petition cites no authority from this Court or from any lower court finding a First Amendment violation based on the mere initiation of such proceedings. Whether petitioners have any First Amendment claim warranting review should await the outcome of the proceedings, where the bar committees can consider and address petitioners' contentions in light of the traditions and needs of the state-court judicial system.

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[7] This case involves none of the exceptions described in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975): the First Amendment issue has not been finally decided below and may not be conclusive of the dispute; the outcome of bar-committee proceedings is not preordained; the First Amendment issue may not survive or require decision after those proceedings; if it does, review of the claim can be had later; and there is no realistic threat of eroding federal policy by allowing initiation of such bar proceedings.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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